INSURANCE COUNSEL JOURNAL

PUBLISHED QUARTERLY BY THE INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL
AVENUE B AT 19TH STREET, BIRMINGHAM, ALABAMA

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Subscription price $10.00 per year. Single copy $2.50

Entered as Second Class Mail Matter at the Post Office at Birmingham, Alabama

Vol. XXIV July, 1957 No. 3

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1956-1957

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PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America or of any of its possessions or of any country in the Western Hemisphere, who are actively engaged wholly or partly in the practice of that branch of the law pertaining to the business of insurance in any of its phases or to Insurance Companies; to promote efficiency in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States of America or in any country in the Western Hemisphere; and to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

President's Page

IN THE interest of better service to our members of this Association and to the readers of the Journal, the Executive Committee, upon the recommendation of our efficient Editor, has directed that the July issue of the Journal be published timely regardless of our convention dates, and that convention news shall appear in the October issue.

It is my privilege to again greet you through the medium of the "President's Page." This is my last and final message as your President, and I am deeply grateful to you for having given me the opportunity to serve you. It has been a real challenge, but I enjoyed every minute of it. By the time you read this, I will have humbly joined that illustrious group known as "Past Presidents."

During my year as your President my work load has been immeasurably lightened by the sage counsel of Past President Dodd, the enthusiastic help of President-Elect Betts, and the able assistance of our Secretary, Frank O'Kelley, and of our Treasurer, Charles Pledger, and by all members of the Executive Committee who contributed so generously of their time and talent. A limitation on time and space prevents me from mentioning personally all of the Committee Chairmen and personnel and all of our fine members and their wives who have served so well to carry on the fine traditions of our Association. To all of them, my heartfelt "thanks."

Following the policy established under President Dodd, the clerical work of the Treasurer's office has now been transferred to the office of our Executive Secretary, and under the capable guidance of Blanche Dahinden that office is functioning even more efficiently than we had anticipated.

We need have no concern about the continued success of this Association as long as its members will, in the future, continue to furnish the fine articles for the Journal as they have in the past and serve on committees which form the framework of this Association.

JOHN A. KLUWIN
President

CURRENT DECISIONS

In each issue of the Journal there will be published two or three pages of Current Decisions. These will be brief digests of recent cases of particular interest to insurance lawyers. All members of the Association are urged to participate in this important feature of our Journal.

Reports of Current Decisions should be sent to your State Editor. Full credit will be given to all contributors.

COVERAGE LIMITED TO FAMILY

The case of *Wildman v. Government Employees' Ins. Co.,* 48 A.C.R. 30, 307 P. 2d 359, construes the wording of an automobile insurance policy which attempted to limit coverage to the named insured and any member of the insured's immediate family (INSURING AGREEMENT III - DEFINITION OF INSURED). This case holds that in California it is not possible to exclude from coverage any person driving the insured automobile with the express or implied permission of the insured, or any person responsible for its use.

The pertinent portions of the supreme court's opinion are as follows:

"We are of the opinion that for an insurer to issue a policy of insurance which does not cover an accident which occurs when a person, other than the insured, is driving with the permission and consent of the insured is a violation of the public policy of this state as set forth in sections 402 and 415 of the Vehicle Code.

"Inasmuch as sections 402 and 415 of the Vehicle Code set forth the public policy of this state such laws must be considered a part of every policy of liability insurance even though the policy itself does not specifically make such laws a part thereof.

"We conclude that the restrictive endorsement hereinbefore set forth and discussed is ambiguous; that the construction thereof urged by defendant insurance carrier would be violative of the sections of the Vehicle Code heretofore discussed; and that said sections were intended by the Legislature to be, and are, a part of every policy of motor vehicle liability insurance issued by an insurance carrier authorized to do business in this state." (Contributed by Frank J. Creede, State Editor, San Francisco, California.)

RE-OPENING SETTLED CASE

An order approving settlement of claims for personal injuries by seven children was set aside in *In re Whitish,* 47 Wash. 2d 652, 289 P.2d 340. The children were injured in a collision with a Richfield Oil Company truck. Representatives of the oil company agreed with the mother of the children to settle for the injuries for $5,500. Letters of guardianship appointing Mrs. Whitish were obtained simultaneously with a court order authorizing her to settle on the agreed basis. It is significant that the application for her appointment as guardian stated that *after* payment of the various expenses of the children, their individual estates would not exceed $500.

Some time later, the present action was brought to set aside the order approving the settlement. The attack was based upon the court's alleged lack of jurisdiction to approve the settlement since no valid guardianship had been established.

A Washington statute provides that prior to appointment as guardian an applicant must take an oath and file a bond. It further provides that where the value of a ward's estate does not exceed $500, letters of guardianship may be issued without bond. On the basis of that provision, no bond had been required of Mrs. Whitish because the *net* value of the estate of each child was less than $500.

The Supreme Court of Washington decided that the $500 value in the statute referred to the *gross* estate of a ward rather than the net estate after deduction of expenses. The court reasoned that the welfare of children is the paramount consideration. If the statute were interpreted to refer to the value of the net estate, a guardian could defraud his ward by overstating expenses, leaving the ward without the protection of a bond. The court felt that the legislature did not intend to per-

mit a guardian to escape the bond requirement by this method.

A previous decision held that failure to provide a bond deprived the court of jurisdiction to appoint a guardian and, without a valid appointment, the court was without jurisdiction to approve the $5,500 settlement.

Following this decision, a properly appointed guardian successfully brought suit on behalf of the seven children. A Spokane, Washington, court awarded them a $54,000 judgment in January, 1957. This trivial economy in bond premium suggests the familiar story commencing, "For want of a nail, a shoe was lost." (Contributed by Payne Karr, State Editor, Seattle, Washington.)

* * *

THEFT INSURANCE— PROOF OF LOSS

An automobile dealer delivered a new 1956 Lincoln automobile to a Dr. Percy Covington Powell, Jr. in return for a check drawn upon a local bank in the full amount of the purchase price of the car. Dr. Powell was given a temporary registration card and the car was equipped with temporary tags. Dr. Powell drove away in the car and neither he nor the car have been found since. The check was not honored because Dr. Powell had no account with the bank on which it was drawn. The dealer's theft insurance policy contained an exclusion which removed from coverage,

> ". . . loss resulting from either the Insured voluntarily parting with the title and possession of any automobile if induced so to do by any fraudulent scheme, trick, device, false pretense, or from embezzlement, conversion, secretion, theft, larceny, robbery, or pilferage committed by any person including any employee, entrusted by the Insured with either custody or possession of the automobile."

The dealer sued on this policy; the insurance carrier admitted the policy but pleaded the exclusion in defense. On motion for summary judgment for the defendant-insurance company, the U.S. District Court for the District of Columbia held that the loss complained of here was excluded from the coverage of the policy. *Grady Motors Corp. v. Travelers Fire Insurance Company,* U.S.D.C., D.C., January 18, 1957, 147 F. Supp. 290. (Contributed by Alexander M. Heron, State Editor, Washington, D.C.)

* * *

NEWLY ACQUIRED AUTOMOBILE— NOTICE TO INSURER

In *Ohio Casualty Insurance Co. v. Robert L. Nelson and John T. Conlon, et al.,* 149 Wash. Dec. 714, 306 P. 2d 201, a comedy of errors resulted in the loss to the insured of liability coverage under an indemnity insurance policy. The errors were the result of the inability of various persons involved to keep track of what kind of car the insured owned at a particular time.

The son of the insured became involved in a collision with John and Leona Conlon, as a result of which the Conlons were injured. A claim was filed with the insurance company, which then brought this action under the Washington declaratory judgment act to determine the extent of its liability. Robert Nelson, the insured, and the Conlons, claimants, were joined as parties defendant.

The insurance contract contained a definition of "insured" which included any person using the autmobile with the permission of the named insured. Hence, Junior Nelson was covered to the same extent as his father.

In the provisions of the policy defining the word "automobile", it was stated with reference to newly acquired automobiles that upon acquisition of an automobile different from that described in the policy (1) if the named insured notified the company within 30 days following delivery, and (2) if it replaced that described in the policy, or if the company insured all automobiles owned by the named insured at such delivery date, the new automobile would be included in the term "automobile" so as to be afforded coverage under the policy. (An exception was stated to cover situations where there was other valid and collectible insurance on the newly acquired automobile, and provision was made for payment of additional premiums.) Failure to comply with the foregoing requirements prevented coverage of Nelson's newly acquired automobile.

The policy originally covered a 1939 Buick. In January, 1954, an endorsement was placed on the policy amending it to cover a 1947 Frazer and ceasing coverage of a *1933* Buick. In the following July, the

insured purchased a 1949 Mercury on contract and gave the vendor a fire, theft and material damage policy issued by American Fidelity & Casualty Co. on a 1949 Chevrolet. The contract was assigned to a bank, which then wrote to the George Dunton Agency, agent for both insurance companies, identifying the American Fidelity & Casualty policy and asking for a change of car endorsement and a completed loss payable endorsement.

Reversing the trial court, the supreme court held that there was no liability for damages resulting from use of the 1949 Mercury under plaintiff's policy insuring a 1947 Frazer. In order for the cross complainants, Conlon, to recover, it was necessary that they establish the "essential facts" that (1) Nelson had in fact disposed of the 1947 Frazer and (2) he, or someone in his behalf, had notified the plaintiff's agency of the disposition of the Frazer and requested transfer of coverage from the Frazer to the Mercury. Notice to the Dunton Agency that Nelson desired to transfer the material damage coverage by American Fidelity & Casualty on his 1949 Chevrolet to the 1949 Mercury was not notice that he desired to change the coverage by plaintiff on his 1947 Frazer to the 1949 Mercury. (Contributed by Payne Karr, State Editor, Seattle, Washington.)

* * *

BURGLARY INSURANCE— PROOF OF LOSS

A mercantile open stock burglary insurance policy contained a coverage limitation defining the term "burglary" and providing that,

> "The company shall not be liable for loss or damage: *** unless records are kept by the Insured in such manner that the Company can accurately determine therefrom the amount of the loss or damage."

The United States Court of Appeals for the District of Columbia Circuit held that there can be no recovery upon such a policy where the only proof of loss consists of accounting data which tends to reflect a general inventory loss over a period of time during which an alleged burglary took place, but which does not indicate that the shortage was caused by any particular burglary, the time when the shortage, if any, occurred, and what goods were missing. *Samuel Paper v. Boston Insurance Company,* January 24, 1957, (C.C.A.D.C.). (Contributed by Alexander M. Heron, State Editor, Washington, D.C.)

* * *

DECLARATORY JUDGMENT— COPYRIGHT NOT INFRINGED— THE "BEARDSLEY PLAN"

The "Beardsley Plan" was, in essence, an adaptation of the blanket indemnity bond device to the exigencies of situations requiring the replacement of corporate securities which became lost or were stolen. Beardsley claimed a copyright on the form of bond included in his "plan" and charged Continental Casualty with infringement. In this declaratory judgment suit, decided April 4, 1957, Palmieri, District Judge, held in favor of Continental, ruling that "an idea cannot be copyrighted". Of particular interest to lawyers is the following quotation from the court's opinion:

"Skill in drafting legal instruments necessitates familiarity with the applicable forms and with the apposite jurisprudence. It follows that time tested terminology lends itself to repetitive use, given similar needs for its employment. The essence of good drafting is to free the client as much as possible from the danger of litigation, and the chances of controversy are generally attenuated when words with a history of settled meaning or of accepted usage are found and utilized. While this practice in other fields might be termed plagiarism, among lawyers its propriety is unquestioned." *Continental Casualty Company v. Hulbert T. E. Beardsley, et al.,* Civil 83-242, U.S. District Court, S.D.N.Y. (Contributed by John A. Henry, Chicago, Illinois.)

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INTERESTING READING*

DAMAGES—BREACH OF CONTINGENT FEE CONTRACT

Berry v. Nichols, Ark., 298 S.W.2d 40.

Plaintiff was retained in a personal injury case under a 45 per cent contingent fee agreement. His negotiations with the insurance company resulted in a settlement offer of $2,000. The tort claimants discharged plaintiff, retained other counsel, and subsequently settled their claims for $6,000. Under Arkansas decisions, an attorney employed under a contingent fee contract and discharged without cause may sue for breach of contract and recover the contract price less the expenses he would have incurred if the services had been continued. Under these circumstances, the Supreme Court of Arkansas, in an opinion by Millwee, J., declared that plaintiff was entitled to recover 45 per cent of the recovery of $6,000 less probable expenditures of $300.

DRIVEWAY NOT INTERSECTION

Sweeney v. City of Albany, Ga. App., 96 S.E.2d 527.

Defendant, while driving on a city street, was involved in an accident with an automobile which entered the street from a private driveway. He was convicted under a city ordinance for failure to yield the right of way to a vehicle which had entered the intersection from a different highway. The Court of Appeals of Georgia, Gardner, P. J., set aside the conviction on the ground that a private driveway, not being a highway, does not form an intersection with a public roadway.

DEATH STATUTE CONSTRUED

Sausaman v. Leininger, Ind. App., 137 N.E.2d 547.

The Appellate Court of Indiana, in a recent application of the automobile guest statute, which bars recovery for injuries to a guest unless caused by the "wilful or wanton misconduct" of the host, has held that the host motorist was not guilty of such misconduct in turning off the ignition to coast although this resulted in a locking of the steering mechanism so that the motorist was unable to turn to miss a tree. The evidence showed that the type of automobile in question was constructed so that the steering mechanism would lock upon removal of the ignition key but that the mechanism on this particular automobile had not locked upon similar occurrences in the past. Opinion by Kendall, C. J. Bowen, J., dissented.

RELIGIOUS BELIEF BARS WORKMEN'S COMPENSATION BENEFITS

Martin v. Industrial Accident Commission, Cal. App., 304 P.2d 828.

An employee's religion forbade the eating of blood of another and so characterized a blood transfusion. The employee was seriously injured in the course of his employment and required a blood transfusion. The employee and his wife advised the hospital authorities of their religious belief and chose death for the employee in preference to violating this tenet of their religion. The widow and children sought death benefits under the Workmen's Compensation Act. The District Court of Appeal, in affirming the denial of benefits, said that the Commission in reaching its determination that the refusal of the transfusion was unreasonable took into consideration deceased's religious beliefs. Called upon to distinguish between the rule that an employer takes the employee as he finds him in regard to pre-existing diseases and the present situation wherein the religious belief existed at the time of employment, the Court did so by pointing out that the Act contains no exception in case of injuries contributed to by a pre-existing physical condition, whereas it does contain such an exception in the case of an unreasonable refusal to accept medical care. Opinion by Nourse, Justice pro tem.

COLLISION NOT TRANSACTION WITHIN DEAD MAN'S STATUTE

Gibson v. McDonald, Ala., 91 So.2d 679.

Plaintiff was injured in an accident which killed the drivers of both automobiles and she brought an action against the administrator of the estate of the driver of the other automobile. Plaintiff was not permitted to testify as to the facts involved in the collision. The Supreme Court of Alabama, in an opinion by Stakely, J., said this was error. The Court was of the opinion that plaintiff was in the position of a mere observer and that the collision was not a "transaction" within the dead man's statute.

HIGH COURT CONDONES INVOLUNTARY BLOOD TEST

Breithaupt v. Abram, U.S.N.M., 77 S.Ct. 408.

While petitioner was unconscious following an automobile accident, a physician at police direction withdrew a blood sample. An analysis of this sample was used as evidence in an involuntary manslaughter prosecution arising out of the accident to support the claim that petitioner had been driving while under the influence of intoxicating liquor. In a 6 to 3 decision, the Court, speaking through Mr. Justice Clark, concluded that the blood test was not such conduct as to shock the conscience or offend a sense of justice. Mr. Chief Justice Warren, Mr. Justice Douglas and Mr. Justice Black, dissented.

INFANT TAKES GUEST STATUS OF MOTHER

Welker v. Sorenson, Ore., 306 P.2d 737.

A 29 month old boy accompanied his mother on an automobile trip. The mother was a guest of the driver. In an action to recover for the wrongful death of the infant in an automobile accident, the Supreme Court of Oregon, speaking through Lusk, J., said that the child's status was determined by that of the mother. The Court reconciled this result with its previous decision in *Kudrna v. Adamski*, 216 P.2d 262, wherein it was held that a child did not have legal capacity to accept an invitation to be a guest passenger, on the ground that while the child was in the automobile in the custody of his mother, the mother was not a guest but was the principal of the driver.

GOVERNMENT ADDITIONAL INSURED UNDER AUTO POLICY

Irvin v. U. S. U.S.D.C.S.D., 148 F.Supp. 25.

A rural mail carrier, involved in an accident during the performance of his duties, had taken out an automobile liability policy which covered as additional insureds any person or organization legally responsible for the use of the automobile. The tort claimant proceeded under the Federal Tort Claims Act, 28 U.S.C.A. § § 1346 (b), 2671 *et seq.*, and the United States impleaded the insurer as a third-party defendant. The United States District Court for the District of South Dakota, Mickelson, Chief Judge, concluded that the government was an "insured" under the policy.

WORKMEN'S COMPENSATION COMPROMISE SURVIVES DEATH OF EMPLOYEE

Chavez v. Industrial Accident Commission, Cal. App., 307 P.2d 985.

An employee executed a compromise and release of his workmen's compensation claim and forwarded them to the insurance carrier. Before approval of the compromise by the Industrial Accident Commission, the employee died from a non-industrial cause. The employer and its insurance carrier thereupon sought to rescind and withdraw from the compromise on the ground of failure of consideration. The District Court of Appeal of California, White, P. J., said that in view of the disagreement as to the nature of the employee's injury, the parties in entering into the compromise were settling the controversy itself. Also, the Court said, the parties contracted with the understanding that an award for the injury would probably be made in installments during the employee's lifetime and would terminate upon his death. The Court concluded that the consideration received by the employer and carrier was a settlement and release of the employee's right to receive such an award so that his death did not affect the consideration.

From The Editor's Notebook

In this column, from time to time, the Editor proposes to publish news and views that he believes will be of interest to our members. Any opinions expressed are either the personal sentiments of the Editor or are the opinions of those persons to whom they are attributed.

Members of I.A.I.C. are cordially invited to submit material for this column. If and when you have views to express on insurance and legal subjects, or when you learn of items of news that you believe of general interest, send them in! As space permits, we'll publish them with credit to you as the contributors.

THE article on medical malpractice appearing at page 267 of this issue provides material that can be used effectively by I.A.I.C. members in meeting with various medical groups. Chairman Edward H. Borgelt, of our Malpractice Insurance Committee, says, "I am convinced that the only real progress which can be made in reducing the number of claims — at least on a short term basis — lies in the direction of 'educating' the doctors to the dangers which lie ahead". If I.A.I.C. members will let it be known to their local medical organizations that they will be glad to meet with them and discuss this subject, it should be productive of good results.

THE first American Congress of Legal Medicine and Law-Science Problems will be conducted by the Law-Science Institute at the Hotel Morrison, Chicago, from July 8 to July 13 and from July 15 to July 20, 1957, with the aid of the Law-Science Academy of America and the Law-Science Foundation of America. Basic and advanced instruction in medicolegal aspects of personal injury problems will be presented by a large faculty of outstanding physicians and surgeons and eminent trial lawyers. Details and registration information can be obtained from Dr. Hubert Winston Smith, University of Texas, Austin 12, Texas.

DURING the week of September 9, 1957, a one week course on Radiation for Industrial Physicians and Lawyers will be offered by the Institute of Industrial Health and the College of Law of the University of Cincinnati. For further information write: Secretary, Institute of Industrial Health, Kettering Laboratory, College of Medicine, University of Cincinnati, Cincinnati 19, Ohio.

A NEW, 25 minute, 16 mm, black and white sound film, "A Pre-Trial Conference", is now available for rental or purchase from the Educational Sales Department, University of California, Los Angeles 24, California. Some of the points covered are medical examination of plaintiff, depositions and discovery, identification and admission of exhibits, limitation of number of experts, elimination of unnecessary parties, and exploration of possible settlement.

THE June issue of the Virginia Law Review contains a comprehensive note entitled, "The Variable Annuity: Security or Annuity?" It deals primarily with the question whether the variable annuity is a security within the meaning of the Securities Act of 1933, hence subject to SEC regulations. Reprints are available, at one dollar per copy. The address is Charlottesville, Virginia.

NACCA is defined as "an organization to comfort the afflicted and to afflict the comfortable", in an article by Professor Thomas F. Lambert, Jr., editor of the NACCA Law Journal, which was reprinted in a recent issue of the Congressional Record. In discussing what he believes are some of the reasons for the increasing size of jury verdicts, Professor Lambert asserts that "the plaintiff's bar has become better trained and educated". He continues, "With the advent of emphasis on demonstrative evidence (blackboard techniques, the use of diagrams, x-rays, colored photographs and the like); attendance at medical-legal institutes, with enlarged knowledge of anatomy, and trauma, and disease of the portion of the body involved, and increased skill in examining and cross-examining doctors as to the diagnosis and

prognosis of the case; yes, if pardonable mention of it may be made, with the entrance of NACCA and its facilities on the scene; plaintiffs' lawyers have become better trained, * * *".

Looking to the future, Professor Lambert predicts that among the "restrictive rules and pockets of immunity" which are "on the way out" are "the immunity in tort of the State and its subdivisions, the tort immunity of charitable institutions; denial of liability in some States for prenatal harm; rejection of the attractive nuisance doctrine in others; host-guest statutes; the unjust doctrine of contributory negligence instead of the superior comparative negligence doctrine."

Based, at least in part, on those predictions, Professor Lambert foresees that the "field of personal injury practice" holds out the promise of "a full life and one rich beyond the dreams of avarice". What he does not say — but what necessarily follows —is that such riches would be taken from the pockets of the people who pay the premiums on insurance policies, the fares on buses, railroads and airplanes, the cost of hospital and medical care, the taxes that support state governments, the monthly bills for gas, water, telephones and electricity, and the prices charged by those who manufacture and sell the products that all of us require in our everyday living.

DISCUSSING the proposition that "trial by jury is today on trial before the ultimately supreme court, the court of public opinion", Judge William J. Palmer, of Los Angeles, presents a most interesting article in 20 F.R.D. 65. He states the "indictment" as follows:

> "In all events, trial by jury is today on trial before the ultimately supreme court, the court of public opinion. These are the charges: Juries are 'taking the law into their own hands'. They are making their own *ex post facto* laws of the road; they are giving verdicts out of sympathy, regardless of law, with no sympathy for insurance companies and generally none for any other corporation; they are awarding excessive, unreasonable sums to persons injured in automobile accidents; as a consequence of their misdeeds, all of us are required to pay higher and higher premiums for more and more insurance, to protect us against the possibility of bankruptcy flowing from a moment or two of negligence; the jury trial is too slow and cumbersome; it is congesting our court calendars so that justice is being denied by being delayed; and it is too costly."

After taking up each of those points, Judge Palmer concludes: "We have no certain evidence that gambling on justice is any more hazardous for those who have justice on their side in trials before juries than in trials before judges. "Only a comparatively few, unusual verdicts of juries are reported in the press. Their day-by-day, routine handling of the problems of litigation proceeds without notice beyond the few concerned. True, they will go astray at times, but I have known them, even when composed mainly of housewives, to show an amazing resistence to pure sympathy, a conscientious faithfulness to the court's instructions, and a remarkably intelligent and sensible disposition of the issues. * * *

"* * * The jury system has not so congealed in form and procedure as to be proof against mutation and adaptation. Ideas and methods now in existence could make such headway in the coming decades and centuries as to correct in a reasonably complete and satisfactory way the s h o r t c o m i n g s of the system. * * *

"As an ideal and a theory, trial by jury is so worthy of our devotion as to charge us with a heavy responsibility for preventing, if we can, injustice, unreasonable expense and improvidence of time in its functioning."

VIEWING the lawyer's compensation, it is interesting to read the words of George Wharton Pepper in his autobiography, "Philadelphia Lawyer",[1] in which he says that no record in the life of a lawyer would be complete wer nothing to be said about fees. Note this:

> "From (my first five years) my earnings have come from about three-eights of my total output of time and effort. Relations with clients have been happy and in the rare instances where there have been discussions about fees the outcome has always been a friendly adjustment. The size of one of the largest fees

[1] J. P. Lippincott Company, 1944

I ever received was due to the fact that the client insisted upon paying twice as much as I charged. * * * When highly paid public officials declaim from time to time about the selfishness and greed of the bar it would not be improper to remind them that many of us have been doing all our lives without pay more real work than they have ever dreamed of doing to earn their generous salaries. * * *

"Looking back over my own professional life and that of many, many other busy lawyers, I am really amazed to see the amount of work that has been done with no thought of financial reward."

Report Of The Accident And Health Insurance Committee—1957

LOWELL L. KNIPMEYER, *Chairman*
Kansas City, Missouri

THE Report of the Accident and Health Committee for the year 1956 mentioned a decision of the Federal Trade Commission wherein it ruled that the commission had jurisdiction over the matter of advertising of accident and health insurance in interstate commerce.

The decision was made in connection with the ruling that The American Hospital and Life Insurance Company must stop alleged misrepresentations in advertising its accident and health policies with respect to illnesses covered by the policy, amounts paid for each, and maternity benefits.

On April 9th, 1957, a decision was rendered in this case on appeal to the United States Court of Appeals for the Fifth Circuit entitled *The American Hospital and Life Insurance Company, Petitioner, v. Federal Trade Commission, Respondent* (not yet reported).

The courts of appeals reversed the decision of the Federal Trade Commission and held that the Federal Trade Commission was without jurisdiction. The court said:

"The Commission urges that a state does not have and never did have the power adequately to control the advertising practices of out-of-state insurance companies doing business within its boundaries. The Congress, seemingly, had no doubt that a state might exercise such power and we have none. The Supreme Court, we think, has expressed the same view in holding, with respect to another phase of state insurance regulation,

'These regulations cannot be attacked merely because they affect business activities which are carried on outside the state. Of necessity, any regulations affecting the solvency of those doing an insurance business in a state must have some effect on business practices of the same company outside the state. Nothing in the Constitution requires a state to nullify its own protective standards because an enterprise regulated has its headquarters elsewhere. The power New York may exercise to regulate domestic insurance associations may be applied to foreign associations which New York permits to conduct the same kind of business.'

Hoopeston Canning Co. v. Cullen, 318 U. S. 313, 63 S. Ct. 602, 87 L. Ed. 777.

"If there is an 'irreducible area' of Commission jurisdiction, we are of the firm conviction that the matter presented by the record before us is not within it.

"The Commission relied heavily upon *United States v. Sylvanus, 7th Circuit 1951, 192 F. 2d 96,* in support of its jurisdiction. An indictment was returned, in the Sylvanus case, for use of the mails to defraud in the sale of insurance by mail. The McCarran Act was held to be no bar to prosecution. A fraudulent scheme carried on by use of the mails would violate the mail fraud acts even though the mails never crossed a state boundary. *See New York Life Insurance Co. v. Deer Lodge County, supra.* The doctrine of the case, with the decision of which we have no disagreement, is of no bearing on the problem before us here. A violation of the postal laws does not of itself confer jurisdiction on the Federal Trade Commission.

"The Commission's Examiner found that each of the States in which the

petitioner did business, except Mississippi, had enacted laws for the regulation of false and deceptive advertising. Mississippi enacted such a law while the matter was pending before the Commission. This is not controverted. The Examiner found that the petitioner's advertising matter was not false, misleading or deceptive. Holding, as we do, that the Commission was without jurisdiction, we do not reach the merits."

Another decision of interest is a decision of the United States Court of Appeals for the Ninth Circuit in the Fireman's Fund case *(James F. Crafts v. Federal Trade Commission),* decided February 27, 1957. This case involved an appeal from an order enforcing a subpoena duces tecum issued by the Federal Trade Commission to Crafts in a proceeding against the Fireman's Fund Indemnity Company. The court said:

"Not only did the District Court have jurisdiction to decide, but also that it is required to decide whether the statutes have withdrawn the power from the Commission to regulate the particular area of interstate commerce in insurance solely when the Court is moved to enforce a subpoena so definite in demand for specific books or papers that the scope of authority may be defined. Since this present subpoena demanded in mass all books, papers and records of the Indemnity Company including those relating to the intrastate business of that Company in California, wherein Fireman's Fund was incorporated, the order of enforcement was too broad. While it may be the duty of the Court to enforce a subpoena insofar as the demand be 'in accordance with law' *(Administrative Procedure Act, § 6 (c), 5 U. S. C.A. § 1005 (c), quoted Supra),* here the phraseology was such that the Court had no means of segregation of items, if any, over which the Commission had jurisdiction from those as to which Congress had explicitly denied them authority. *Hale v. Hankel, 201 U.S. 43; Federal Trade Commission v. American Tobacco Company, p. 22, 264 U. S. 298.* The subpoena in the instant case is not sufficient to present the question of jurisdiction, if any, remaining to the Commission. The proceeding should be dismissed."

During the past year, many state legislatures were in session and various laws relating to accident and health insurance were adopted. In this connection, it must be noted that, on June 15, 1950, the National Association of Insurance Commissioners approved and adopted a "Uniform Individual Accident and Sickness Policy Provisions Law". Most of the states have now enacted this law with certain modifications.

Mr. Mark Martin of the Dallas Bar and a member of this association has reviewed the development in the adoption of the "Uniform Individual Accident and Sickness Policy Provisions Law" in an address to the Insurance Law Section at the 79th Annual Meeting of the American Bar Association, which is reported in the Insurance Section of the American Bar.

Respectfully submitted,

Lowell L. Knipmeyer, *Chairman;* George D. Young, *Vice-Chairman;* Leonard G. Muse, *Ex-Officio;* Sam Rice Baker; Ralph C. Body; Stanley M. Burns; Darwin D. Coit; Martin J. Dinkelspiel; Thomas J. Long; Allen Meyers; Samuel P. Orlando; Hugh E. Reynolds; Walter A. Steele.

Report of Committee on Aviation Insurance — 1957

G. I. Whitehead, Jr., *Chairman*
New York, New York

EACH year brings new and exciting progress in aviation and the year since the last annual meeting of the International Association of Insurance Counsel has not been an exception. The domestic trunklines flew 23.2 billion passenger miles in 1956 compared with 19.7 billion in 1955, and with .62 passenger fatalities per 100 million passenger miles. Accounts in local newspapers across the country of flights of the Boeing 707, presaging the first jet air transport scheduling for late 1958, draw public attention to the fact that we already are in the age of commercial jet flying. Business flying, too, continues its amazing growth as industrial aid aircraft

become more and more a part of American industry.

Unhappily, there is another side to this wide range of progress because things do go wrong, giving rise to claims and litigation, often creating complex differences. Separation and control of air traffic is one problem already broadly exposed to the public in magazine and newspaper articles, and perhaps dramatized most intensely by two recent collision accidents: the first, over the Grand Canyon, June 30, 1956, involving two scheduled airlines, a United Air Lines DC-7 and a Trans World Airlines Constellation; and the second, a collision between a Northrop F-89 jet and a Douglas DC-7 which occurred near Sunland, California, January 31, 1957. When accidents of this sort occur, government and industry's first concern is what can be done to prevent similar accidents in the future. However, such accidents also provide a number of serious challenges for insurance counsel who have the responsibility of attending to the claims and defense of lawsuits.

This rapid growth of air transportation and a similar growth in aviation accident litigation to be defended, whether the defendant is a major airline or a supplier of a single small component, means to the insurance bar, too, a growing area of business potential and consequently a need to keep informed about what the courts are doing in airplane cases. Your Aviation Law Committee has prepared this report of some representative aviation cases decided in the past year as a part of its continuing effort to keep the association membership abreast of what is going on in the aviation insurance claims-legal business.

LIABILITY OF MANUFACTURERS AND REPAIRERS

A wrongful death case decided December, 1956, in California, *Patricia L. Allen, et al., v. United Aircraft Corporation, et al.,* U.S.D.C., S.D. of California, Southern Division, was tried to the jury on the issue of damages after the defendants had admitted liability. The deceased, while in line of duty for the United States Navy, was operating a helicopter manufactured by the defendant when it crashed and killed him. There was evidence that a part or parts were missing from the tail rotor assembly. The jury awarded $215,000 to the widow and two infant children.

The United States Supreme Court in the case of *Gibson v. Lockheed Aircraft Service, Inc.,* (1956), 350 U.S. 356, 76 S. Ct. 366, reinstated the judgment of the trial court in the amount of $50,000 for the plaintiff after the Court of Appeals for the Fifth Circuit had reversed and remanded for a new trial (217 F. 2d 730). The plaintiff, a test pilot, sued for injuries sustained in the crash of a B-29. He claimed that the defendant was negligent in repairing the aircraft and preparing it for the flight on which he was injured.

In the case of *Northwest Airlines, Inc., et al., v. Glenn L. Martin Company,* 350 U.S. 937, 76 S. Ct. 308, the United States Supreme Court denied Martin's petition for certiorari. The action filed against the manufacturer alleged that aircraft delivered to the plaintiff airline were designed and manufactured negligently. In the trial court, the jury returned a verdict in favor of the defendant, Martin. The Sixth Circuit reversed and remanded for a new trial, (224 F. 2d 120).

LIABILITY OF AIRCRAFT OPERATORS TO PASSENGERS

In *Herman, Admx. v. Eastern Air Lines, Inc.,* U.S.D.C., E.D. of New York, February 7, 1957, the plaintiff sought recovery for injuries and wrongful death growing out of a crash-landing of the defendant's air plane on which the decedent was a fare paying passenger in the vicinity of Richmond, Virginia. After the landing had been completed, the passengers evacuated the aircraft without incident. There was no evidence that any passenger was injured. The deceased died several months after the emergency landing, and the plaintiff contends that death was due to an aggravation of pre-existing conditions. Applying the laws of Virginia to both causes of action, the court held that:

> ". . . it must be concluded that under Virginia law, in order to recover disabilities resulting from nervous strain, it is not enough to show there was some physical impact. The nervous strain must be accompanied by actual physical injury.
>
> "In view of the foregoing, there must be judgment for the defendant."

In *D'Aleman v. Pan American World Airways, Inc.,* U.S.D.C., S.D. of New York, April, 1957, the issue submitted to the jury was the question of fault in failing to take care of a sick passenger and whether that failure was the proximate cause of his later

death. Jury returned a verdict for defendant.

The validity of limitations of liability for baggage again has been upheld in a recent case, *Randolph v. American Airlines, Inc.,* Ohio Court of Appeals, Franklin County, December 12, 1956. The common pleas court awarded the plaintiff $835.00, the value of a suit case and contents lost after it had been turned over to the defendant to be transported. The sole question on appeal was whether or not limiting liability for loss of or damage to baggage to $100.00 was authorized by the Civil Aeronautics Act of 1938 as amended and a valid limitation. The court held that the tariff effectively limited to $100.00 the amount the plaintiff could recover. The case is pending in the Supreme Court of Ohio. The case of *Wilson v. Capital Airlines,* U.S.C.A., 4th Cir., January, 1957, involved injury to a passenger who fell while in the airplane's lavatory. In finding for the defendant, the court used this language in stating the carrier's duty:

> "Defendant was a common carrier, and was bound to exercise the highest degree of care and foresight for its passengers' safety; this duty applied to the lavatory as well as the other parts of the plane. But a carrier is not an insurer, and the mere fact of the injury is not sufficient to raise a presumption of negligence on the part of the carrier."

LIABILITY OF AIRPORT OPERATORS

A Pennsylvania decision, *Daniels, et ux v. County of Allegheny,* U.S.D.C., W.D. of Pennsylvania, September 26, 1956, held that the county's operation of the Greater Pittsburgh Airport is a business enterprise and therefore it is responsible for injuries to persons properly on the premises if negligence can be shown. In denying a motion for a new trial following verdict for the plaintiff who was injured when she fell while walking to the parking lot, the judge said:

> ". . . it is this court's observation that the step at the parking lot end of the curved pedestrian bridge is simply an engineering monstrosity."

In deciding a motion for summary judgment based upon immunity of the state from a suit growing out of airport operations, a Minnesota court held:

> "Plaintiff is entitled to a day in court of somewhat greater stature than that envisioned by the motion for summary judgment, which must be denied, *Braniff Airways, Inc. v. Falkinham,* et al, 143 F. Supp. 935."

LIABILITY FOR SURFACE DAMAGE

The case of *Ted Anderson, et al., v. The Port of Seattle, et al.,* 304 P. 2d 705, is one of a number of lawsuits in which the owners of property adjacent to the Seattle-Tacoma Airport seek damages in the use and enjoyment of their premises. The Port of Seattle showed that the properties had been appraised at their fair cash market value and this sum was accepted and paid. Plaintiffs urged the position that in accepting the purchase offers they did not relinquish their rights to seek past damages. The court decided that the property owners had been fully compensated for the permanent damage to their properties and could not claim temporary damages for the same injuries. See article by Payne Karr in the April, 1957, Journal, "Airport Growing Pains".

The rule of strict liability was imposed in a recent Louisiana crop spraying case, *Gotreaux v. Gary, et al.,* Louisiana Supreme Court, February 27, 1957. The trial court held the defendants free from any negligence, but on appeal the court compared operations of aerial applicators to blasting operations and adopted this language from *Fontenot v. Magnolia Petroleum Co.,* 227 La. 866:

> "We are unwilling to follow any rule which rejects the doctrine of absolute liability in cases of this nature and prefer to base our holding on the doctrine that negligence or fault, in these instances, is not a requisite to liability, irrespective of the fact that the activities resulting in damages are conducted with assumed reasonable care and in accordance with modern and accepted methods."

LIABILITY OF BAILEES

In *Martin School of Aeronautics, Inc. v. Bank of America National Trust and Savings Association,* 303 P. 2d 1084, the plaintiff sued to recover damages to a rented airplane which crashed, killing the renter pilot, just after take-off. The appellate court reversed the judgment for the defendant and remanded for a new trial,

and in doing so stated the rule:

> ". . . that the burden of proof rests upon the defendant in a case such as this. It has been long established law in this state as elsewhere that a bailor who sues his bailee for conversion or breach of contract may safely rest after proving the bailment and failure to redeliver . . ."

SOME WARSAW CONVENTION CASES

There are contradictory decisions whether the Warsaw Convention is self-executing. In a recent New York case, *Noel v. Linea Aeropostal Venezolana,* 144 F. Supp. 359, the judge indicated that no separate cause of action was created by the convention. The action was commenced to recover for the death of a passenger on board the Venezuelan airplane which crashed off the New Jersey shore on a flight from New York to Caracas. Admiralty jurisdiction of the Federal High Seas Death Act was an important issue to be decided. The court followed *Higa v. Transocean Airlines,* 124 F. Supp. 13, aff'd. 230 F. 2d 780, in holding that the admiralty forum is exclusive.

A novel idea was injected into the case by the plaintiffs when they alleged that the decedent passenger died in the air space over the water outside admiralty jurisdiction. The court had this to say in disposing of the plaintiffs' contention:

> "Neither authority, the language of the Statute nor the dictates of common sense sustain a holding that the fulfullment of the jurisdictional requirements of the Federal Death on the High Seas Act is to be governed by the determination of such an elusive fact as to whether a person died above, on or in the sea". (5 Avi. 17, 125).

In the *D'Aleman* case cited on page 2, it already has been said that the issue involved the duty of a common carrier to give such reasonable attention as the circumstances permit to a passenger if the crew knows or has notice of the facts requiring them to know that he is sick and in need of attention. The case also presented a question of admiralty inasmuch as the plaintiff alleged that an engine failure and sudden movement of the airplane on the flight from Puerto Rico (on the High Seas) caused the psychosis and death. The judge took the Federal Death on the High Seas claim himself and dismissed it after the jury came in with defendant's verdict on the issue of failure to arrange for treatment.

Berner, et al., v. United Air Lines, Inc., et al., 3 A. D. 2d 9, (New York Supreme Court, App. Div.) affirmed the New York Supreme Court's denial of the motion to vacate service of the summons upon an agent of the defendant, British Commonwealth and Pacific Airlines. (149 N.Y.S. 2d 335). It appears that British Overseas Airways Corporation as general sales agent for BCPA sold a Warsaw Convention ticket in New York for travel over the routes of BCPA — San Francisco to Sydney, Australia and return — to a passenger who was killed in the crash of a BCPA airplane while traveling on the ticket. Among other things, the court said:

> "And it seems to us, finally, that when British Commonwealth and Pacific undertook by its agent to make a contract of carriage in New York expressly and in terms governed by the Warsaw Convention, at a 'place of business' within the jurisdiction of the New York Supreme Court and that place of business is literally one 'through which the contract has been made', it is doing business in such a way as to give jurisdiction by the service of process on the agent who thus is brought with the carrier's approval within the literal terms of the Convention".

In *Goodman v. Pan American World Airways, Inc., et al.,* New York Supreme Court, Westchester County, January 11, 1957 (for subsequent proceedings see 148 N.Y.S. 2d 353, 136 N.Y.L.J. No. 90, p. 13), the jury returned a verdict for the defendant on the issue of willful misconduct, Warsaw Convention, Article 25, and a verdict for the plaintiff in the conceded amount of $8,300 less costs which were awarded to the defendant. In the course of the trial, the plaintiff agreed to dismissal of the action against the co-defendant United Aircraft Corporation. This action grew out of the death of a passenger in an aircraft which crashed in Brazil while on a flight from Rio de Janeiro to New York.

SOME INSURANCE POLICY INTERPRETATIONS

An aviation exclusion clause was upheld in *Smith, et al., v. Prudential Insurance Co. of America,* Missouri Supreme Court, March 11, 1957, 5 Avi. 17, 287. In brief

the exclusion applied if the insured died as a direct or indirect result of flight in an aircraft while the insured was acting as a pilot or crew member. At the time of his death, the deceased, an air force colonel, had ground duty but on the particular flight — an airlift of personnel to attend a conference — he was designated as the copilot. The court said:

". . . It is conceded that at the time of the crash insured was aboard the plane as the only official copilot 'orderwise'. Since these facts appear from plaintiff's evidence and also from the documentary proof of defendant, we rule that the trial court did not err in determining the issue as a matter of law.

". . . To permit a jury . . . to find (in the face of the written orders and flight plan) that insured was not the copilot at the time of the crash would be to approve a verdict based upon sheer conjecture and speculation."

In *Braniff Airways, Inc. v. Falkingham, et al.,* U.S.D.C., District of Minnesota, January 18, 1957, 4 Avi. 17, 233, suit was brought to recover for damage to the plaintiff's aircraft resulting from a ground collision with a snow plow. The defendant moved to have Braniff's hull insurers made parties plaintiff on the ground that they are insurer subrogees of the plaintiff under the terms of a contract of insurance and the proof of loss. In denying the motion, the court said:

"Even though a partial insurer subrogee is a real party in interest, he is only a proper party, not a necessary party, to a suit brought by the insured to recover the full loss."

STATE LEGISLATION

There are a number of aviation bills that have been introduced in current sessions of the state legislatures with no action that can be reported at this time. However, there are two recent enactments of interest:

Tennessee — The "absolute liability" statute for damage to persons and property on the surface was repealed by both houses by a bill which in substance provides that liability for such damage will be determined "in accordance with the rules of law applicable to torts in this State."

Wyoming — A law enacted with respect to regulation of air taxi operations by the Wyoming Aeronautics Commission provides, among other things, for compulsory insurance.

INTERNATIONAL PRIVATE AIR LAW TREATIES

Ratifications of international conventions on private air law and their amendments have been slow. At the time this report was prepared, the Rome Convention of October, 1952 (The Convention on Damage Caused by Foreign Aircraft to Third Parties) had been ratified by only two states, Egypt and Canada, and it is not yet in force. Also, The Hague Protocol to amend the Warsaw Convention (Convention for the Unification of Certain Rules Relating to International Transportation by Air) does not have the 30 ratifications required. The Warsaw Convention, however, continues to have wide acceptance— there have been no denunciations — and new adherences include Venezuela, Egypt, and the Union of South Africa and Territory of South West Africa.

Respectfully submitted,

G. I. Whitehead, Jr., *Chairman;* Gerald Hayes, Jr., *Vice-Chairman;* Payne Karr, *Ex-Officio;* M. Cook Barwick; Samuel O. Carson; Donald L. Case; David L. Corbin; Jean DeGrandpre; Willis H. Flick; L. Duncan Lloyd; W. Percy McDonald, Jr.; Philip J. Schneider.

Report of Committee on Federal Rules of Civil Procedure — 1957

Josh H. Groce, *Chairman*
San Antonio, Texas

THE formation of a committee on the Federal Rules of Civil Procedure was authorized at the July, 1956, meeting of the association at White Sulphur Springs. The need for such a committee became apparent when efforts were made to "liberalize" the Federal Rules of Civil Procedure.

The association, acting largely through the now chairman of this committee, protested the adoption of these "liberalized"

rules through an amicus curiae brief filed in the supreme court, and although apparently none of the "liberalized" rules has been adopted by the supreme court the committee has kept in touch with the matter and has requested that its chairman be furnished with any proposed changes in the Federal Rules of Civil Procedure. No proposed changes have come to the attention of the committee since its formation, but the committee will analyze carefully all proposed amendments that come to its attention and will cooperate with other organizations to try to preserve the Federal Rules of Civil Procedure substantially as they now exist, and without liberalization.

Respectfully submitted,

Josh H. Groce, *Chairman;* Richard W. Galiher; Kenneth B. Hawkins; Robert P. Hobson; William E. Knepper.

Report Of Fidelity And Surety Insurance Committee—1957

ARTHUR A. PARK, *Chairman*
San Francisco, California

DURING the past year the members of the Fidelity and Surety Insurance Committee have demonstrated their active and continuing interest in the field of Fidelity and Surety Law. This interest has resulted in an exchange of correspondence among the members with particular reference to recent decisions in the various jurisdictions of importance to the surety industry.

Through the efforts of the committee two articles were published in the Insurance Counsel Journal, both by R. Emmett Kerrigan of the firm of Deutsch, Kerrigan and Stiles, New Orleans, Louisiana. The first article appeared in the January issue of the Journal entitled, "The Surety As Competing Claimant To Contract Funds," and was a most excellent and comprehensive treatise on the subject covering the more important decisions up to the time of its writing.

Mr. Kerrigan's second article, appearing in the April issue of the Journal entitled, "Recent Developments In The Contest Between The United States And The Surety For Contract Funds" might be considered a supplement to the first in which he commented on the case of *United States Fidelity and Deposit Company of Maryland v. New York Housing Authority.* The opinion of Judge Medina is set forth in full in Mr. Kerrigan's article and it is earnestly recommended that this decision be read by all those interested in this problem.

The committee is informed that an article has been written by Mr. Edwin Cassem of the firm of Cassem, Tierney, Adams, Kennedy and Henatsch, Omaha, Nebraska, entitled, "The Miller Act – Sub Contractor's Materialman – Sufficiency of Notice – Remedy Where Notice Insufficient". It is expected that this paper will appear in the July issue of the Journal and the committee is certain that all members look forward with interest to reading Mr. Cassem's paper.

On July 11, 1956, during the meeting of the association at Greenbrier, a meeting of the Fidelity and Surety Insurance Committee was held, at which time some ten members were present. There was a most interesting discussion covering the more important fields of fidelity and surety law. Among other things, the question which was then current as to whether or not a surety on a payment bond is liable for union welfare funds was brought up and in that connection the case of *United States v. Carter and Hartford Accident and Indemnity Company* was thoroughly reviewed and discussed. At that time the Ninth Circuit had affirmed the decision of the United States District Court for the Northern District of California in granting the surety's motion for summary judgment. The court of appeals held that the trustees for the union had no right to sue on the bond since they were neither persons who had furnished labor or material, nor were they seeking sums "justly due" such persons. The United States Supreme Court granted certiorari to resolve the questions of statutory construction which were at issue.

Since the Greenbrier meeting and on April 29, 1957, the United States Supreme

Court reversed the decision of the Ninth Circuit and held the surety liable for welfare funds.[1] In the opinion of the committee, the case is of such importance to members of the association that a brief statement of the facts and the decision is incorporated in this report.

In November, 1952, one Donald G. Carter contracted with the United States to construct certain public buildings at Air Force bases in California. As required by the Miller Act, he filed performance and payment bonds executed by the Hartford Accident and Indemnity Company as surety. The master labor agreement under which Carter operated obligated Carter to pay wages to his employees at specified rates and also required that he pay to the trustees of the health and welfare fund 7½ cents for each hour worked by his construction employees.

Carter became insolvent after completing the construction work and paying his employees the wages payable directly to them. However, he failed to make his required contributions to the welfare fund.

The trustees of the fund in the name of the United States instituted an action on the payment bond against Carter and his surety in the United States District Court for the Northern District of California. The district court granted the surety's motion for summary judgment and the court of appeals affirmed. The United States Supreme Court, on April 29, 1957, handed down a decision holding the surety liable.

It is evident from an analysis of the court's decision that it placed much emphasis on the fact that the contributions to this welfare fund were a part of the consideration the contractor agreed to pay to "every person who has furnished labor".

The surety contended that the unpaid contributions were not "wages" due to the employees and that the employees, having received all the "wages" owed to them, had been paid in full as that term is used in Section 2 (a) of the act. The court held, however, that the act did not limit recovery on the bond to "wages" and stated that, "Not until the required contributions have been made will Carter's employees have been 'paid in full' for their labor in accordance with the collective-bargaining agreements."

Certain language used by the court is somewhat significant and would indicate the trend to give more and more protection to laborers having claims against sureties. For example, the court stated, "While the precise questions of statutory construction now presented are ones of first impression, prior decisions of this Court construing the Miller Act of 1935 and its predecessor, the Heard Act of 1894, indicate that the Miller Act should receive a liberal construction to effectuate its protective purposes."

During the meeting at Greenbrier on July 11, 1956, the members of the committee also discussed the various issues arising out of the efforts of the surety to obtain contract balances upon completion of the work or payment of the labor and material bills. This subject has been thoroughly covered by many excellent articles, particularly Mr. Kerrigan's article commented upon above. Mr. Harold Rudolph suggested that this should be a perennial subject. Until such time as there is some decision of the United States Supreme Court, all surety lawyers will be continually confronted with the problem arising out of the efforts of the government to collect contract balances covering unpaid taxes of the contractor.

Respectfully submitted,

Arthur A. Park, *Chairman;* Elmer B. McCahan, Jr., *Vice-Chairman;* Lester P. Dodd, *Ex-Officio;* Newton E. Anderson, Edwin Cassem, J. Harry Cross, J. Murray Devine, C. Hundley Gover, Newton Gresham, Alexander M. Heron, Charles Cook Howell, Jr., Harold W. Rudolph, Herbert E. Story, Elber H. Tilson, Ozell M. Trask, Mark N. Turner, Harvey E. White, Mark Wilmer.

[1]—U.S.—, 77 S. Ct. 793.

Report Of The Home Office Counsel Committee—1957

MILTON A. ALBERT, *Chairman*
Baltimore, Maryland

THE Home Office Counsel Committee has acted on applications of seven men during the course of this year and there are three additional applications now in the course of being processed. Of the seven applicants for which the committee has completed its action, the results of which were then passed on to the Executive Committee, we have been informed by the Executive Secretary that three of the applications were accepted, two were rejected and two are still pending, awaiting final action by the Executive Committee.

A study of the membership roster was made to determine the number of insurance companies represented in the Association and the number of men representing those companies. The results show that as of March, 1957 — 119 companies were represented by 178 men.

In addition, there are nine men representing six other organizations, as follows:

Association of Casualty & Surety Companies	— 4
American Mutual Alliance	— 1
General Adjustment Corporation, Inc.	— 1
Greyhound Corporation	— 1
National Association of Mutual Casualty Cos.	— 1
University of Illinois	— 1

Respectfully submitted,

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Report Of Workmen's Compensation And Unemployment Insurance Committee—1957

GEORGE MCD. SCHLOTTHAUER, *Chairman*
Madison, Wisconsin

THIS report will discuss the procedures followed by the industrial commissions or boards of the various states to resolve questions arising out of conflicting medical testimony in workmen's compensation hearings. The purpose of the report is to outline the general picture, and to suggest certain conclusions, rather than to pretend to prepare a California lawyer to handle a workmen's compensation case in Maine.

The workmen's compensation acts of most states provide that contested matters are to be adjudicated before administrative boards or commissions at which a hearing examiner or arbitrator presides. The exceptions are the states of Alabama, Louisiana, New Mexico,[1] Tennessee and Wyoming, where such cases are tried before the court. Rather than attempt to codify the law by states, certain categories will be discussed describing the procedures of groups of states, and to point out certain situations which are exceptions.

In the trial of compensation cases, the following problems are frequently presented:

(a) The medical testimony is in direct conflict.

(b) Medical testimony presented is not in accord with the medical evidence presented in previous cases in which the commission has made certain findings of definite medical facts.

(c) Insufficient, or no medical testimony is presented.

MEDICAL EVIDENCE OF EMPLOYEE

The general rule is that the employee may select a doctor to testify on his behalf at the hearing, such doctor being subject to cross examination by the employer, and also by the hearing examiner. In Wiscon-

[1]New law, effective June 8, 1957 — creates administrative board.

sin, the employee (but not the employer) may submit a formal verified written medical report which becomes of record, after being filed with the industrial commission, at least 15 days before the hearing. A copy of this report is then served on the employer who may call the reporting doctor to submit to cross examination at a hearing, but that will be at the expense of the employer. Thus the employee is able to obtain the testimony of his doctor at a minimum of cost. It is generally agreed that this procedure has been satisfactory to all concerned. The formal nature of the report requires the doctor to answer certain material questions, and the employer is fully advised of the position of the doctor prior to the hearing. This gives the employer ample opportunity to obtain other medical testimony, if such is available.

In certain states, notably Oregon, medical testimony is submitted to the commission by written report only, and the doctors do not testify in person. However, either party may appeal to the circuit court, where there will be a trial *de novo*.

MEDICAL EVIDENCE OF EMPLOYER

The general rule is that the employee is required to submit to an examination by a doctor acting for the employer, prior to a hearing. The doctor for the employer usually submits a written report, but such report does not become of record unless accepted by agreement of the parties. Generally, the doctor for the employer testifies at the hearing, and is subject to cross examination by the doctor for the employee.

MEDICAL REPORTS

Certain states require that the medical reports of each party must be filed with the industrial commission and made available to the adverse party, prior to the hearing. In some instances, such medical findings must be submitted on commission forms, and certain pertinent and material questions answered.

MEDICAL EVIDENCE IN DIRECT CONFLICT

In those hearings in which the medical evidence is in direct conflict, three general categories of procedure are followed. In Ohio, Arizona, and certain other states there are medical experts on the commission staff, and they review the evidence and render an opinion. Then, either party has the right to request that a consulting board of three doctors be appointed, and a collective opinion obtained. Such opinions are not however, conclusive, but will be evaluated by the hearing examiner or board. In certain other states, including Washington and Wisconsin, after a hearing in which medical evidence is in dispute, or where the commission is in doubt, the industrial commission may appoint an impartial, disinterested and independent doctor to make an examination of the employee. The doctor's written report is then filed with the commission, and becomes a part of the record. Copies of the report are served on each party and either party has the right to call the independent doctor at its own expense at a hearing and cross examine him. The report of this independent doctor is not given greater credence than is the testimony of other doctors by the commission.

In Tennessee, a neutral doctor can be appointed by the court to make an examination and report, but there is no provision in the statute as to what happens after that. While the laws of several states permit the use of independent medical examiners, it appears that such procedure is seldom employed. In Michigan for instance, this procedure is rarely used. This is because compensation benefits for permanent partial are based on 100% loss of use of a member, the payment is computed on loss of earning ability, rather than extent of impairment, where there is partial disability of a member. Pennsylvania has a similar rule.

Nebraska is one of a number of states which has no provision for the appointment of an independent, disinterested medical examiner. In Nevada, an employee is examined by the commission's staff doctor, before the hearing, and his report becomes of record.

Perhaps the extreme rule is represented by Utah. There, a finding of the commission-appointed medical panel is final and conclusive, unless the objector can show the panel is in error. This virtually amounts to a shifting of the burden of proof on the objector to show that the panel opinion is wrong.

WHERE MEDICAL EVIDENCE IS CONTRARY TO THE PREVIOUS RULINGS OF THE INDUSTRIAL COMMISSION

In certain instances, the industrial commission has the power to contradict all of the medical testimony and make an adverse finding. In *McCarthy v. Industrial Commission,*[1] the only medical testimony presented at the hearing was from the employee's doctor, who testified positively that the employee sustained a hernia, under the facts of the situation described by the evidence. The Wisconsin commission disregarded such testimony and in fact contradicted it in its finding, that no traumatic hernia had been sustained. Was the commission weighing the evidence, or was it supplying evidence? In this and certain other cases, the industrial commission has injected its own expert knowledge and experience into the case, to contradict the positive testimony of the doctors. Meanwhile the parties were without notice of the fact that the industrial commission was going to do so.

CASES IN WHICH THERE IS NO MEDICAL EVIDENCE

The industrial commission in view of its experience, is permitted to form a judgment on the basis of certain facts testified to by laymen, in cases involving uncomplicated medical history. This departs from the old rule that where there is no evidence, no finding can be made.

POWER OF INDUSTRIAL COMMISSION AS TO FINAL DETERMINATION

The general rule is that the final determination of medical questions rests with the industrial commission. Findings of fact, (and medical findings are in that category), of the commission are final if there is credible evidence in the record to sustain them. This rule arises from the now commonly accepted assumption, that commissions and boards administering the workmen's compensation law have become expert by their experience and knowledge and this fact is recognized by statutes and by appellate courts.

In certain instances, industrial commissions have based their findings on *ex parte* or secret investigations or examinations, but this has universally been rejected by the courts as a violation of due process of law.

CONCLUSIONS

Having made a survey of the situations in the various states regarding the above subject, then we are suggesting for your consideration, the following conclusions:

1. The facts on which the industrial commission bases its findings should be evidentiary facts, and in the record. Parties then have the opportunity to rebut, and contest such facts and cross examine witnesses. When the commission wants to decide a case on the basis of its own expert knowledge and experience, due notice should be given to the parties, with an opportunity for them to introduce additional testimony if they so desire.

2. Resolution of disputed medical matters will be expedited if each party has access to the medical reports of the adverse party before the hearing. In a number of instances, cases are dismissed when medical reports are exchanged.

3. It is generally agreed that independent medical examinations are best made by doctors in private practice, and not on the staff of industrial commissions, although there are notable exceptions. Also, the reports of the independent medical examiners should go into the record, yet the parties should have the right to cross examine the reporting doctor. Honest differences of opinion are desirable in the adjudication of all cases.

4. While the industrial commission should have the power to refer disputed medical questions to impartial experts for examination and opinion, the testimony of such experts should not be entitled to any special weight.

5. Whenever it appears that medical testimony is not adequate or sufficiently complete for the commission to make a determination on the record, then additional testimony, both medical and factual, should be requested if it appears to the commission that such is available. A subsequent hearing may be scheduled to hear such testimony.

The above will present the general picture in the administrative-law-evidence problem which arises in workmen's compensation hearings. The laws of evidence have greatly been relaxed in workmen's compensation cases. However, it is submitted that the rules of evidence which

[1]194 Wis. 198, 215 N.W. 824.

are designed to insure an irreducible minimum of fair play, such as the right to have all evidence in the record and to cross-examine witnesses wherever possible should be retained and should be respected.

Respectfully submitted,
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Twelve Years Of Insurance As Commerce—Prospects For The Future*

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THE TITLE of this paper suggests that I am supposed to supply some knowledge of future things. This art (of "divination" as it is called) has been practiced from ancient times and by all grades of culture. The means vary. Contact with superhuman sources is said to be among the more reliable methods. Unfortunately, I have had no such contacts since I started this paper.

There are other methods but my own limited experience with them would lead me to an acceptance of the idea, so often voiced by the poets and philosophers, that "the curtain of the future is always drawn". For the most part those who have written on such matters seem to believe that this impregnability of the future is the design of a merciful providence and seals mankind from the terrors which would preoccupy his mind from certain knowledge of future adversity and the careless ease which would result from full confidence in an assured prosperity.

But this is not to say that we should despair of our ability to influence the future. Prophets we are not, architects we may be.

Because this is so it is worth our while to consider *what we can do to achieve the future we desire,* and in a sense that is the real title of this paper. In the effort to see more clearly the plans which we must make, if we are to aspire to the role of architects of the future, it would not be out of order to voice a few prophecies, to be treated, not as efforts to pierce the sable curtain, but merely as hypotheses perhaps worthy of some consideration.

For the purpose of today's discussion I am going to equate the subject "regulation of insurance" with the subject of "insurance rate regulation". In doing this I would not have you think that I am unaware of other aspects of insurance regulation and I think I should digress briefly to refer to the astonishing attempt currently being made by the Federal Trade Commission to establish regulatory power over the insurance business. Note that I said "insurance business". I did not say the accident and health mail order business. If this effort is wholly successful we shall be almost back where we were in 1944 in the struggle to preserve state regulation as the dominant source of regulatory power. I believe that we shall win but no lawyer these days can predict the outcome of any complex litigation without acknowledging the possibility of being wrong. During the course of preparing this paper I read a note in one of the law reviews which contained the following sentence:

> "if, and when, the jurisdictional controversy is taken to the courts, the Commission will probably prevail . . . since the states cannot regulate interstate business, it must, therefore, fall within the jurisdiction of the federal government and the Federal Trade Commission."

Also, I noted very recently a press account of an address by a former Assistant United States Attorney General in which

*From a paper prepared for delivery at the 1956 Annual Meeting of American Mutual Alliance, Chicago, Illinois, Tuesday, November 27, 1956

**Vice-President and General Counsel, Liberty Mutual Insurance Company

he seems to express the view that the degree of zeal being applied by a state to the conduct of its regulatory processes may measure the extent to which the state has ousted federal jurisdiction.

These opinions are, in my judgment, quite incorrect but, nevertheless, these items are disturbing. They should teach us that we must not make the mistake of thinking that the views of the Federal Trade Commission are so clearly without reason, merit or support as to assure us of victory because of their, to us, evident invalidity. On the contrary, victory can be obtained only by preparing and making the most careful and thorough defense we are capable of presenting. That defense should include a general tightening up of regulatory procedures even though we may believe that as a legal matter the existence of comprehensive regulatory statute accomplishes a complete ouster of federal jurisdiction.

Back in 1944 the Governing Board of the National Association of Mutual Casualty Companies created a special committee to study the problems arising from the South-Eastern Underwriters Association decision and to make recommendations.

At the time of the creation of the committee it was furnished with a statement of the position of the board of that association which stated that it favored exclusive state regulation of the insurance business, including the regulation and approval of insurance rates.

This committee produced two comprehensive reports which include a detailed history of the activities of the member companies of this organization during the two years following the S.E.U.A. decision. As you all know the net effect of these activities was the support, in legislatures throughout the country, of efforts to enact rate regulatory legislation based upon the pattern of the all-industry bills. This pattern was not, by any means, in full accord with the views of the Alliance members, but it was such that we believed that under it "sound and effective regulation" could possibly be achieved. All of us had our doubts. We knew the job was very difficult. We pointed this out and set forth some of the things that had to be done.

In taking action to support this legislation we were motivated, I believe, by a deep conviction that "sound and effective regulation" was highly desirable both as a matter of self interest and as a matter of public welfare. The record shows many statements to this effect, but perhaps none more eloquent than the following, which appeared in the 1946 report of the special committee:

> "Insurance affects the lives, property, welfare and security of a large part of the total population. Insurance takes small amounts of premium from great numbers of people for the benefit of the few who are struck by catastrophe. Insurance, through the safeguarding and investment of funds in effect held in trust for claimants, exercises a tremendous influence upon the economic life and organization of the country. Insurance contracts are complicated legal documents, the interpretation and evaluation of which are entirely outside the scope of ordinary activities of most insurance buyers. Manifestly it is greatly in the public interest that the public be able to buy such contracts easily, that the public can rely on the contract without legal advice, that the price charged for the protection of the contract be fair, reasonable and not excessive, that all buyers are treated alike, without unfair discrimination, and above all, that the protection so purchased will be given when needed through the continued solvency of the issuing insurance carrier. These legitimate public interests cannot be protected in full measure without sound and effective rate regulation."

I doubt if we can turn to any one thing which can be regarded as a brief definition of what we meant by "sound and effective rate regulation". I don't think we believed that there was only one particular pattern which would meet our concept but we did have in mind certain essential characteristics which a rate regulatory pattern would have to exhibit to meet our ideals. These characteristics were set forth in full in a memorandum, prepared by the special committee on legislation of the American Mutual Alliance. One such essential characteristic was that the loss provision in rates should be based upon a broad base of experience accumulated under uniform classifications. Another was that ratemaking bureaus should not only be permitted, but encouraged, as the most desirable as well as the most feasible means of assuring the accumulation, preservation and use of expert knowledge in doing the technical work of ratemaking and as an essential

part of a system of rate administration.

It was also our belief that while the vigorous pressures and forces of competition should not be destroyed they had to be regulated to the point of not permitting them to exist in such rampant and destructive forms as to prevent the attainment of the chief goals which, as we stated, were believed to be:

1. The preservation of solvency, and
2. The assurance of fairness in the practices of companies and their agents.

We believed also that the office of "Commissioner of Insurance" should be strengthened. This meant longer terms of office for the commissioner, better salaries for able men and more staff people who would make careers of their jobs.

In viewing the prospects for the future of rate regulation we must ask ourselves whether these ideals have been realized. I don't think there is any doubt of the answer. They have not. The evidence is all too clear week by week in the news accounts of the current events of our business.

In the field of automobile liability insurance uniformity of classification does not exist. Instead various companies, not members of any rate organization, are writing a large volume of business under classification systems which are not the same as and not compatible with that used by the bureau companies. Thus it is not possible to combine automobile experience in ways which are of maximum value to the ratemaker. The policy forms in use by the various companies are not uniform and in recent months we have seen one of the large so-called independents simply appropriate policy language devised after many months of hard work by bureau committees and alter it to the extent necessary to give the company's salesmen several "talking points" in favor of its form. We have seen department after department grant approval of this form without, so far as is apparent, asking for any e x p l a n a t i o n or justification for the changes. Only a remarkable degree of self restraint on the part of bureau companies prevented a destructive "coverage war" from developing. We have seen the new uninsured motorist coverage, born, I suspect, of a desire to frustrate the will of the people that financial responsibility be made mandatory, introduced on a country-wide basis without any evident concern as to whether the violation of public policy which is inherent in the form will have some very serious effects upon policyholder relationships and upon the interpretation of the cooperation clause in the standard policy forms. (I refer to the conflict of interest between the company and its policyholder which arises when the company has, on one hand, an interest in establishing the policyholder's freedom from negligence and on the other an interest in defeating his claim against the uninsured motorist.) We are seeing how the introduction of this form by one company forced all the others to make it available, regardless of their own convictions as to its unwisdom.

We have seen new multiple line powers being used in such a manner, and at such a pace, as to choke and overwhelm the existing means of dealing with the intricate problems of statistics, taxes and bureau jurisdiction which these uses present. We have seen how such unrestrained uses of new powers have brought about the invention of such outlandish devices as the "filing agent", who takes no responsibility for his actions, the "new form of insurance", without benefit of any legislative action, the "indivisible premium policy" which becomes so by the simple device of giving it that name. We see companies without previous experience in such fields being forced into engaging in multiple line activities by the approval and widespread use of a form of policy under which every company fears that upon expiration of its present fire policies there will be no business left to renew because it will have been "picked up" during the term by someone else using the new homeowners forms.

We see that companies are being permitted to appropriate and use fire bureau rates and forms without being members of or subcribers to such bureaus. We see partial subscribership being allowed for certain fire classes, which are costly to administer, and independent action being permitted as to the less costly dwelling classes.

"Commission wars" are in progress with little hope of the re-establishment of any mechanism for dealing with commission problems. Flexible rating plans are in use which, while apparently a necessary response to competitive conditions, are cap-

able of competitive abuse, and are difficult to use without producing some unfairly discriminatory results.

We see novel provisions being rather casually used in policy forms which may subject the user to liabilities not visualized by either party at the time the business was written. We see bitter controversy as to the proper basis for allowing deviations or other departures from fire bureau rates with leading companies and their executives resorting to various media to express their opinion of the other party's interpretation of what the public interest requires.

We see instances of once conservative companies, that only a decade ago were among the strong advocates of regulation, deciding to become at least partly "independent". Human nature being what it is we see such departures from what was once regarded as sound principle being rationalized as sound and desirable procedure rather than as regretable and perhaps temporary expedients.

The almost total lack of policing procedures in some lines of insurance seems occasionally to be used to attain predetermined results for other lines.

There is a feeling that "anything goes" and, perhaps most insidious of all, we are seeing the development of an attitude that it is unwise to speak out in opposition to things that are wrong because it may be only a little while before we shall have to do those things ourselves.

There is a restlessness among companies which have clung to more conservative attitudes and a feeling that self-interest now compels them to meet "fire with fire" even in the face of a knowledge that historically one excess breeds another, and that one still another, in chain reaction style.

We see, in a few states, that ratemaking or approval tends to be politically motivated and in one state it seems to be accepted as true that the governor's office has, in effect, refused, as a matter of policy, to allow the commissioner to approve rate increases.

In reciting this list of difficulties besetting our business I don't wish to seem to be bewailing everything that is happening, indeed, I now wish to turn to some other things, which are also going on, of an opposite character.

On what I shall call the "favorable" side I would list the following:

1. *The bureau system is in existence and is functioning legally on a national basis.*

The National Council on Compensation Insurance is functioning nationally with a high degree of technical competence and a good degree of acceptance. Competitive excesses seem to have a way of avoiding a direct clash with the workmen's compensation system and it, being well established prior to S.E.U.A., has so far withstood the unsettled conditions of recent years.

The National Bureau is operating in all states permitting bureaus to operate. The Mutual Bureau is operating in 42 states. The various fire bureaus are operating in almost all states. There are two inland marine bureaus. These, together with a number of advisory organizations, constitute the essential framework upon which an effective system of regulation could be constructed. The present value and the future potential of this framework cannot be overestimated. If it had to be constructed from the ground up the task would be nearly insuperable.

These bureaus, for the most part, are repositories of skills and attitudes possessed by sincere and dedicated men, many of whom, having spent their lives in seeking to construct orderly systems of ratemaking and administration, must look with deep concern upon some aspects of the present wave of chaotic conditions.

2. *The National Association of Insurance Commissioners continues to function.*

Effective regulation presupposes the utmost cooperation among supervisory authorities. The N.A.I.C. in recent years has been disappointing in this respect but the structure remains and the possibility of effective functioning is not non-existent. Unfortunately, almost all of the commissioners who were the active leaders during the few years after S.E.U.A. are no longer in office. Turnover continues to be too high to permit very many men to learn much about their jobs or about the general background of the present regulatory statutes. But Commissioner Taylor, now President, and a few others, have shown a rare awareness of current problems and if a group of commissioners can combine forces to supply leadership (it's not a one-man job) much good may be accomplished.

3. *Some progress is being made in dealing with multiple line matters.*

There are indications that some of the confusion which was engendered when new "rating organizations" came into existence to file what was merely a new policy form (the homeowners) is beginning to subside and is being replaced by the much sounder concept that new multiple line forms can sensibly be developed in advisory organizations and recommended by them to the various rating organizations which would normally have jurisdiction over the various portions of the forms. This is a much more orderly approach and if jurisdictional lines can be preserved; if adequate consideration is given to the views of all interested parties; if the "hand in hand" filing procedures which have been developed can be more widely used; if commissioners will refuse to accept filings without responsible support therefor; and if such destructive concepts as that of the "new kind of insurance" and that of "filing agent" can be avoided one can hope for less confusion in the future.

Let us turn now from a consideration of current trends and events and consider what we can do to attain our goals.

If you now expect me to set forth some easy formula you are going to be disappointed. I don't think that anyone could do that. I do want to give you a little essay on government, or political science, which may point the way.

In dealing with the problems of insurance regulation we are dealing with one aspect of the crucial problem of all government. That problem may be stated in the form of a question. "How can we combine that degree of individual initiative necessary for progress with the degree of cohesion necessary for survival?" (In this form the question is almost an exact quote from Bertrand Russell's brilliant little book, "Authority and the Individual".) Essentially the same question was phrased by your committee in the memorandum "State Regulation of Casualty Insurance Rates" as follows:

> "Thus every important decision as to ratemaking and administration requires the considered balancing of diverse and complex factors. There must be a balance between elasticity and uniformity, between the greater equity which comes from refinement and the efficiency of administration which comes from lack of such refinement, between freedom of competition and safety from combination.
>
> "This . . . is the sort of balancing of power and freedom, safety and risk, which must be done if private enterprise is to continue to function in a complicated world."

Perhaps the most important decision ever made by the Alliance was the decision to support the enactment of the All Industry Rate Regulatory Bills. That decision involved the acceptance of a balance between two sets of opposed forces. On the one hand were forces normally inclined to favor a rigid internally policed system of regulation calculated to produce a high degree of stability and safety. On the other extreme were those really opposed to regulation and willing to accept any rate regulatory legislation at all only because it was necessary to do so to escape federal control. This group supported every move which was in the direction of securing a system under which they would be largely free of genuine restraints. The balance which was arrived at, and which was reflected in the all-industry bills, was rather delicate and most of the mutual people felt that it had been moved too far in the direction of a system under which the independents were too much favored. Nevertheless, it was hoped that under strong and skillful administration a system might evolve under which a satisfactory balance existed. This has not occurred. The present system, viewed as a whole, unduly favors the independent operator. He reaps such benefits as he decides to avail himself of from the efforts of the bureau companies and this at very small or no cost to himself in money and responsibility.

The growth of these companies since 1945 has been fantastically greater than that of the bureau companies. Six leading mutual bureau casualty companies increased earned premiums 210%. Seven leading stock bureau companies increased earned premiums 234%. Three leading independent companies (2 mutual and 1 stock) increased earned premiums by 715%.

In 1945 the total earned premiums of the three independents amounted to 35% of the total for the six mutuals; in 1955 the proportion was 93%. The figures are close approximations.

While I have no doubt that other factors have played important roles in producing

this growth the freedom of action which they have been allowed has been a significant factor and cannot exist on a permanent basis in the present degree side by side with sets of restraints which bear heavily upon other groups. Either the balance must be restored or we are headed toward a more serious upheaval than is easy to imagine.

Who and what is to blame? It would be easy to point to the supervisory authorities and no doubt shortcomings exist. One of the most serious deficiencies seems to be that many filings have been accepted and placed in use without an adequate insistence on the part of the supervisory authority that the filer support his filing. This obligation to support is a vital part of the rate regulatory system. Properly enforced it would tend to reduce to manageable size the number and variety of new filings and would exert pressures tending to center responsibility in the technically well-qualified licensed rating organization and in those companies that are willing to pay the contemplated price, in terms of maintenance of adequate supporting information, for being outside the bureau system. Actually the flexibilities which the great majority of independents believe they need and want are presently available within the bureau system and are more apt to be premanently secured there than outside it.

I believe that Alliance committees have always maintained that the regulatory system permitted by the all-industry bills would fail unless the bureaus became strong in terms of numbers of members and subscribers, and the number of "independents" relatively small.

But my chief purpose is to ask you to think in terms of your own responsibilities rather than in terms of what someone else may have done or failed to do.

Again I turn to the field of political science for a guide. Down through the history of modern political thought runs the idea that governments cannot succeed unless they rest upon the consent of the governed. This principle of consent not only underlies the propositions defended by our political forbearers but was to them an active continuous and effective force. George Washington, (in the Farewell Address), put it this way:

> "This government, the offspring of our own choice — has a just claim to your support. Respect for its authority, compliance with its laws, aquiescence in its measures, are duties enjoined by the fundamental maxims of true Liberty . . . The very idea of power of the people to establish government, presupposes the duty of every individual to obey the established government. — All obstructions — all combinations and associations, under whatever plausible character, with the real design to — counteract — the a c t i o n of the constituted authorities are destructive of this fundamental principle."

The performance of the duties of obedience and support, to the point of habit, becomes, in a well-ordered society, the distinguishing mark between it and anarchy.

These duties have, I suggest to you, not been very effectively performed by the insurance community. How often has anything been done to really strengthen the office of insurance commissioner? How often have you spoken up to interpret the system we favor and to insist upon full compliance with the spirit and letter of the law? Have you done your full duty in presenting our views to the public and to the authorities? Have you, even within your own organizations, fully communicated an understanding of your ideals about regulation to your associates? Do you hail or deplore when regulatory pressures bear down upon you?

Someday reform must occur. But let's remember the words of Lord Bryce, "Suffering and nothing else will implant that sentiment of responsibility which is the first step to reform."

Down through the ages governments have sought to regularize possessive impulses. If they are not controlled government has failed to perform an essential function. No doubt the exercise of such controls have always evoked protests. Often these protests come from those who, believing that government has gone too far, would destroy its power. And often these protests merely indicate that the one against whom the pressure is being applied fails to have a full realization that security, justice, and liberty cannot exist without the use of governmental power to protect them.

My message to you is simply this. It is only through an understanding of and an acceptance of the burdens as well as the benefits of government that our hopes for our particular world can be realized. If living within the letter and spirit of existing laws has become too difficult, it is then

our duty as citizens to either (1) remake these laws or (2) remake our own attitudes, and to somehow find the skill and wisdom to make specific applications of our attitudes to specific circumstances in such a manner as to stay in business while still giving sufficient strength to our views to gain for them the acceptance which is essential to the success of any system of government.

I know, as you do, that there will be many instances where we must claim for ourselves the freedoms which have been allowed to others. Obviously, we cannot simply withdraw from the competition for business. To do so would be economic suicide. The day to day problem is to make these adjustments without destroying the underlying structures upon which the ultimate system must depend. But is it not time for us to become more articulate about our beliefs, our fears and our hopes?

I am not trying to tell you that unaided you can change the world. But perhaps your strength is greater than you think. You won't find this out by remaining silent. You must "kick, not growl".

As you see an accurate brief description of the last twelve years is not easy. But twelve eventful years they have been and, if some further characterization of the period is indicated, let me borrow some famous words of Charles Dickens, "It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of despair, we have everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way." In short, the s t r u g g l e s, the inconsistencies, the search for solutions, which marked this period were much like those of many periods of the past and likely will be like many periods of the future as we humans seek to avoid denying to ourselves by our folly what our skills should place within our reach.

The Surety's Problem In Contract Defaults

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THIS paper is not intended as a manual for the guidance of others in the matter of contract defaults. One person's experience, though it stretch back through forty years, will not have encountered all the variants of the situation confronting a surety when a contractor collapses and every man's conclusions receive coloring from the jurisprudence of the area or areas in which he has operated.

It is hoped, however, that it may be useful to claim men and attorneys as a sort of check list by which they may test their own ideas of practical procedure in the light of the policies of their company. It is written from the viewpoint of the man in the field and recognizes but does not attempt to reconcile variant views at home offices or among home offices.

It will be of value, if of any value, only to companies, attorneys and claim men who take an affirmative attitude toward obligations created by contract bonds and propose to discharge them ungrudgingly.

There are still companies and attorneys who, in the event of trouble, proceed on the theory that the surety owes no duty to its obligees except such as may be established against the principal and it in a court of last resort. There are both theoretical and practical arguments for such an approach, but we believe that such an attitude is neither economical or in the interest of the bonding fraternity.

This does not mean that substantive defenses are to be waived or ignored. It does not mean that the rights of all the interested parties, whether obligees, subcontractors, laborers or materialmen, are to be given full consideration and fair appraisal and that any program developed will contemplate full recognition of such rights and prompt discharge of all obligations without compulsion and that in the event of bona fide disputes, an effort will be made to dispose of them on the basis of the real facts and established principles.

The matter we propose to discuss is the development of an overall program for dealing with default in performance. We do not intend to concern ourselves herein with the subject of liability on claims as

these are matters for subsequent consideration in consultation with attorneys familiar with the pertinent rules in the particular jurisdiction and any attempt to examine and appraise them while you are trying to work out the overall program will merely divert your attention from the disposition of the more urgent matter, the arrangement for the most practical and economical manner of performance of the work under contract.

While standard procedure allows you time to remark to any of the underwriters present that obviously the bond should never have been written, any rejoinder may be cut short by stuffing the file into your brief case, phoning for your transportation and reaching for your hat, as you must remember that

You Are Driving An Ambulance, Not A Hearse

There are many reasons for emphasizing the vital necessity of speed in handling such situations. Among them are

1. Interruption of the work in progress will be costly. At best, performance will badly deteriorate while your negotiations proceed as these will necessarily be the prime concern of the contractor, to the detriment of his ability to give proper supervision to the work.
2. Estimate checks will be received and dissipated.
3. The federal government may run a distraint for accumulated social security and withholding taxes on
   a—the obligee,
   b—the bank of the contractor.
4. A bankruptcy petition may be filed either by or against the contractor.
5. Subcontractors may quit the job and assert their rights to be paid on quantum meruit in amounts far in excess of the amounts earned under the terms of the contract.
6. A favorable climate is created for your future operations.

For these reasons, it cannot be said too strongly that some person or persons having power to make binding commitments on behalf of the surety or having direct and continuous contact in or out of business hours or days with one who has such power, should be on the ground as soon as danger appears. The crisis always arises on Friday afternoon when the payroll checks are delivered and there is not enough money in the bank to meet them. We vividly remember a long distance phone conversation at 2:00 a.m. on a Sunday morning which saved a situation and averted a loss which otherwise would have run into many thousands of dollars.

Bad News Is Better Than No News

The basic information required by you will be

1. A copy of the contracts involved including plans and specifications and of your bond or bonds.
2. An up-to-date financial statement of the contractor.
3. A breakdown of the status of each contract (whether bonded or not) showing:
   a—amount of the contract price including extras,
   b—amount theretofore collected on the contract,
   c—estimated cost of completion of the contract, broken down into (1) labor, (2) material, (3) overhead,
   d—unpaid bills on the job.
4. Names of subcontractors and status of payments to them.
5. Information as to any estimates expected in the near future.
6. Best possible information as to
   a—the character of your contractor, not merely as to his honesty but as to his fortitude;
   b—the accuracy of his records and competency of his accountants.
7. Information as to assignments he might have made to banks.
8. Status of Federal taxes and payments thereof.

Don't assume that this information reflects the true situation. Regardless of the good faith of your principal and his accountant you will probably find, among other things, that the unpaid bills run 25% more than shown, the salvage value of the inventory as compared with book value is excessive up to 1000% and the cost of completion will be 25% to 100% higher than the estimate, and you should proceed with this possibility in mind.

It goes without saying, of course, that the urgency of the situation may indicate the necessity of taking interim action along lines hereinafter suggested, pending the full survey, for which you may require the assistance of engineers and accountants.

All of this will be done, however, with your ultimate alternatives in mind. Ordinarily these will be:

1. To take the plane home;
2. Finance completion by your principal;
3. Default, take over and relet;
4. Default and have obligee relet or
5. To arrange for your principal to sublet.

It May Not Be Your Baby

The first thing to be done, of course, is to examine the contract and bond to determine your coverage in the light of the local decisions and, if you are not sure of coverage, to frankly reserve your right to deny coverage, after you complete your survey of the situation.

It not infrequently happens that, after delivery of your bond, the other parties have, in legal effect, completely rewritten the contract. We have seen 100% payment in advance substituted for 100% payment on completion. We have seen payment in second lien notes substituted for payment in cash. We have seen a contract increased from $600,000 to $1,600,000 within three days. We have seen a one story building become a two story building. We have seen payment to a third party substituted for payment to a contractor.

You can leave such babies on the church steps.

Angels Hesitate

The cardinal sin of a claim man at this point would be the advancement of funds to the contractor in any substantial amount prior to a determination of the method of completion. This is for two major reasons:

1. Financing without the consent of the reinsurer is forbidden in your reinsurance contracts;
2. Monies advanced at this stage give rise to no credit against your bond penalties.

If, however, it is deemed important to hold the job together while you make your survey, it is ordinarily advisable to meet the current week's payrolls, for which consent of the reinsurers should be procured by telephone or telegraph if at all possible. We call the money so expended "look money." In addition to any monies so expended, it may be necessary to take care of your principal's traveling expenses, pick up one or two hot checks which may make it difficult for you to deal with some of the interested parties, pay the contractor's bookkeeper his week's salary and, in general, to get rid of any small items which will interfere with working out a program. We could well call this "lubrication money."

Occasionally, the shortage of available funds of a contractor may be met by paying off or expressly guaranteeing the payment of some pressing item, generally the estimate of a subcontractor, thus releasing funds otherwise unavailable for payroll and incidental purposes. This, probably, would not require the consent of the reinsurers.

Get In The Saddle

Before doing anything further, however, you should procure a letter from the contractor admitting his inability to proceed further with the performance of the contract. You can usually get it with ease if you make any advances to him, but in any event it will be vital to any of the programs, even a program of financing. This is called an "admission of default." You may keep it in your files, perhaps, but get it. Only such an admission will protect you and the obligee adequately in taking any further steps in the matter, and it is also necessary, and may be vital, in establishing your prior right to the proceeds of the contract.

Without this there is no action that you can safely take except such as your principal may request, such as a straight loan to him. This, or any other form of assistance, you are in a position to refuse until he has signed a letter stating that without it he cannot proceed with performance.

The only substitute for an admission of default is a fully justified declaration by the obligee of a default and notice by him to your principal in accordance with the terms of the contract of termination of the principal's right to proceed.

In rare cases, such as incapacity or disappearance of the principal, you may have to take a chance and do business on admissions by next of kin or his second in command or both, of inability to proceed.

With this admission of default, you should obtain letters addressed to each of the obligees in the contract or contracts directing them to deliver any future estimate checks in your care and you should also

have a letter authorizing you to endorse and deposit the checks and use the proceeds either in the prosecution of the work or in the payment of bills incurred in connection therewith.

A Gun In Your Back

In the meantime, for reasons which will be further dealt with hereinafter, inform yourself as fully as possible as to the situation relative to all the subcontractors and be prepared to deal with them immediately upon procuring an admission of default. They may hold the key to the success of any program adopted.

No Harm In Trying

At about this point, the matter of salvage will come into the picture. Don't let this divert you from the main enterprise. Tie up the proceeds of the job, of course. You are entitled to them. But you have no more right to the other assets of the contractor than would the other creditors. We don't mean to say, don't try to investigate or get the benefit of such outside assets, but don't let this attempt divert you from your main objective, which is to minimize the loss.

A Home Run

The first alternative, to take the plane home, is available much oftener than some claim men seem to think. It is available, for example, whenever

1. You have only a performance bond, and
2. The obligee has retained ample funds with which to pay for completion, or

1. The contract is essentially a labor contract, and
2. The labor is paid up to date, and
3. The owner has retainage ample to finish the work, or

There has been such a gross departure from the terms of the bonded contract as to

1. The work to be done, or
2. The time, amount or manner of making payments for the work as to constitute a material breach by the obligee, or

Some bank holds an assignment of the proceeds and the unpaid portion of the proceeds exceeds the probable cost of completion, for which reason the bank, in its own interest, must finance cost of completion in order to collect the proceeds, or

It is apparent that your cost in completion of the contract will probably exceed the penal sum of your performance bond after application of any other available funds.

Casting Bread On The Water

As above pointed out, your second alternative is to finance completion of the contract by your principal. This will involve advances to the contractor by the surety or by a bank for the account of the surety. As such advances give rise to no credit against your bond penalty, there having been do default, it may be justified only in extraordinary circumstances, and should never even be considered if a job or the jobs are in initial stages. If the work is approaching completion, however, it should be given full consideration, though some sureties doubt that it should be considered even then.

These doubts arise from experience which teaches that

1. A contractor in difficulties has drawn every cent he can against the work done and is therefore grossly underestimating the amount of work remaining to be done and the probable cost thereof.
2. The contractor, upon realizing his situation, will have no incentive to properly handle the job to completion, his best men will quit and he will have to do the job with his "cutbacks," whose only interest will be to drag the work out as long as possible and thus preserve their jobs.

It follows, therefore, that the second alternative is ordinarily to be rejected unless, as above stated,

1. The work is nearing completion and

(a) You have independent reliable estimates of the cost of completion;

(b) The contractor's records are in competent hands;

(c) The contractor has some hope of emerging from his difficulties without bankruptcy and

(d) There are no outstanding assignments of the future proceeds of the job or jobs, or possible offsets by the owner, or

2. To default the principal would result in the loss of subcontracts, with resultant claims, possibly on a quantum meruit basis, calculated to run the final loss above that to be expected from completion with the principal.

Sometimes practically all of the work remaining to be done is well subcontracted. The vital importance of an early appraisal of the situation relative to subcontracts may be illustrated by a recent experience. There were *twenty-five* subcontracts and this two-million-dollar job was being done at a point remote from any source of competent craftsmen or satisfactory common labor. It would have been almost impossible to interest new subcontractors except at prohibitive prices on account of this labor situation.

Here we note that if more than one contract is involved, whether bonded by your company or not, your program must necessarily be based on the overall picture as, for many reasons, it is impractical to finance one job while permitting defaults on the others.

It should also be remembered that any agreement to finance should be absolutely terminable at your option, as history proves that the situation will continue to deteriorate in the vast majority of cases.

You will, of course, "joint control" the proceeds of the contracts in a bank account or accounts unless his comptroller is completely acceptable to you and will operate under your directions. A new bank is desirable.

You will also require from him assignments and mortgages of all of his available assets.

In this connection, we point out that it will be highly desirable to arrange with some bank to handle receipts and disbursements. You will have a letter directing that all future proceeds be mailed to the bank. This letter, or another letter, should authorize the bank to deposit the proceeds in the special account set up. Any bills paid should be paid by draft on the bank instead of checks. To accomplish this it will only be necessary to place on the reverse side of the check the following language, "By endorsement hereof the claim covered hereby is transferred to the drawee". If the proceeds of the contract reaching the bank are not adequate to take care of all drafts so drawn, you should have an assignment from the bank of these checks upon reimbursement of the bank by you.

In order to permit the bank to handle the matter in ordinary banking fashion, your letter of guaranty to the bank should contain a provision that any notes given to the bank to cover advances made or to be made will be considered as evidence of the obligation and not payment thereof.

The object here is to preserve the claims alive as such.

We particularly note that in the case of contracts with the federal government, it is vital that the matter be handled through a bank and not directly. This is for the reason that the Assignment of Claims Act permits such assignments to banks, and as against such assignee bank, prohibits any offsets by the government of any claims not arising under the contract in question, which is not true as to assignments given surety companies.

To the above warning against financing, we make one more exception. It is to be considered whenever

a—the net worth of the contractor is still substantial, considering all his assets and

b—The amount of the work remaining to be done can be accurately measured.

An illustration would be a highway contractor with a large amount of valuable unencumbered, or slightly encumbered, equipment, or other slow assets such as real estate, whose work done has been accurately measured by the highway engineer. Bad weather or some disaster may account for the disappearance of his quick assets. Ordinarily, however, such a contractor will be able to persuade his bank to carry him along but sometimes his bank has limits on its ability to help him or has become panicky about contractors' credit in general.

Getting The Bad News Fast

This brings us to a consideration of your third alternative course, "default, take over and relet".

From this writer's standpoint, this course is never, well, hardly ever, followed, although the general public, including most obligees, seems to assume that it is the normal thing to be done. The reason for saying "never" is because the fourth method as hereinafter described has all the advantages and none of the disadvantages of

this course. The disadvantages of "taking over" are

1. in most states the surety immediately becomes liable for many obligations for the payment of which it would not otherwise be liable;

2. it waives defenses it may have to third party claims;

3. insofar as the proceeds of the contract are concerned, it may put itself in an inferior position to the claims of the third parties, including those of the federal government, a trustee in bankruptcy, mechanics lien claimants, statutory lien claimants and the like.

4. you will have to put out your own money in payment to the new contractor and your obligee will be only too happy to defer or refuse reimbursement in the case of any adverse claims.

5. your bond penalty limit is out the window.

Many companies, however, consider this third alternative standard procedure and perhaps in some situations the dangers involved are outweighed by the objections of the obligee and his architect or lawyer to the preferred procedure hereinafter suggested as "fourth and fifth alternatives".

Particularly, in dealing with the federal government, policies have become crystalized into "regulations" which preclude the use of the fourth alternative. Nevertheless, particularly in view of the fact that ordinarily you will have only a fifty per cent performance bond involved, we suggest that when "financing" seems not to be justified, you should carefully avoid "taking over" until you have a firm commitment for completing on a lump sum basis from a reliable contractor. Even then, it seems preferable to have any such commitment obligate the new contractor to offer his bid to the government at the reletting. Reimbursement of his expense in getting up his bid, in the event he is not awarded the contract, is a low price to pay for avoidance of the risks of "taking over" and preservation of the possibility of an even lower bid. One of the advantages of permitting the government to relet is that ordinarily it makes a careful inventory of the work remaining to be done before any reletting which tends to reduce the hazard of the new contractor due to possible corrective work for which he must make allowance in his bid.

And here we again emphasize the importance of lining up any subcontractors with your candidate for the job. Remember you will have to pay them anyway for their work to date, and by lining them up you not only eliminate any question as to the proportions to be paid by you under your payment bond and by the contractor as their employer, but eliminate the risk of an actual increase in your overall loss. At a subsequent point we will go into this matter more fully.

Dodging Stray Bullets

The Fourth and Fifth Alternates will be discussed together. Your Fourth Alternative is to default and permit or require the obligee to relet. The Fifth Alternative, a subletting by the principal of all the remaining work to a new contractor, is an awkward variant of the Fourth Alternative, but it may be advisable to take it into consideration in dealing with the federal government or any other red tape bound governmental body or even in dealing with prviate obligees who prove difficult to work with.

It is important to remember that in dealing with a federal contract, any subletting should be accompanied by a statutory assignment to a bank in order to cut off offsets by the government.

Walking On Eggshells

As may have been gathered from the preceding discussion, this Fourth Alternative is ordinarily the best solution, but many claim men seem unaware that they are in a position to require the obligee itself to become a party in the reletting. Personally, so far as we can remember, except in dealing with the federal government, we have never failed to persuade the obligee to recognize this as his logical position and that his rights will not be impaired by his remaining in that position. Only on a very few occasions have we had to say to him that such was our position and that we would not "take over" and then ask him what course of conduct he expected to pursue in view of this position on our part.

It must be said here that, for the handling of the situation under the alternatives under discussion, good relations with the owner and his architects are of prime importance. The engineers and architects are vested with a large measure of discre-

tion and some of them assume to pontificate in matters where they are not, such as the validity of claims. But there is a territory wherein adverse decisions by them can be very costly and contentions over minor matters are to be carefully avoided. The very character of construction contracts gives room for endless disputes.

Plans and specifications on a job are never perfect, any more than is the workmanship on a job. Every contractor of experience recognizes that allowance must be made in the bid for the expense of taking care of the architect's omission and "mistakes". There is nothing wrong about this. Owner and architect are entitled to expect a structure of the quality and character designed and the contractor is not legally or morally free from all responsibility for the sufficiency of the plans and specifications and, in good conscience, either party may and should allow the other a little latitude in construing the plans and specifications. There is room for honest give and take.

But there is also room for chiseling and oppression. We have seen a road contractor ruined as a result of a fist fight between a truck driver and an inspector. On the other hand, we have seen an extra coat of paint on a wall result in the waiver of liquidated damages. We don't mean that it is necessary to "play dead" if an architect is unreasonable. We have seen a school board, without our having to open our mouths, "chew out" an architect and overrule his recommendations when he was acting arbitrarily.

We are under no illusions about the available methods of procuring cooperation, but we do not recommend the "case of whisky" approach. In fact, we find that ordinarily a better atmosphere is created if the architect or owner takes you to *his* club for lunch or you accept the invitation of the chairman of the school board to dinner for the purpose of discussing the matter. This helps to eliminate any subconscious feeling on his part that you may be planning to put something over. *Timeo Danaos et dona ferentes* works both ways.

Your best bet is a genuine intention to fully honor the obligations of your bond promptly and cheerfully and to allow for any additional expense and trouble to which the architect may be put. This will ordinarily produce the proper climate for your operations and may even make you a hero for the simple reason that it will not be expected from a "s-o-b bonding company", at least insofar as the cheerfulness is concerned.

It is to be hoped that an *entente cordiale* with the architect will have been reached well before you have finally determined the method of reletting as the owner will doubtless give his views great weight. In addition, his affirmative help is of great value. Many times the architect will undertake to get out the new invitation for bids or proposals or assist you in so doing. Of course, before any such invitations go out, they should have the approval of both of you and you should be present when the bids are opened and the award made.

When the architect and the prospective new contractor have full mutual respect for each other, you may be able to get a far better proposal and get it on a lump sum basis, because the risk of corrective work is eliminated or at least delimited. In any event, a careful inspection of the work theretofore done and full report by him, will enable interested bidders to eliminate or at least measure the corrective work to be required of them, and to bid accordingly, without adding up to 100% for the unknown.

Hen's Teeth

Of course, you should never be entirely dependent on the owner's architect. Ordinarily your first step will be to procure the services of a competent engineer if you do not consider yourself one. And here technical competence is insufficient. More important is actual experience in construction of the character under consideration. You will desire a person or persons, who can and will

1. give you an utterly disinterested appraisal of costs and difficulties,
2. do, or at least understand, the elementary accounting necessary for the checking of prior payments, claims against the job and the like,
3. undertake to supervise completion, if required, on a fee basis, or perhaps, if so required,
4. give you a lump sum bid themselves.

These are hard to find and when found may be tied up on some other job for the next three months. There are concerns which specialize in this kind of work and offer to furnish competent engineering service, first class accounting, and top

flight legal assistance, but obviously the stand-by expense for such an organization must be taken care of by somebody, and the charges will be high.

Hitching Up The Mustangs

No matter what program you are considering, as heretofore pointed out, not a moment should be wasted in going into the status of all subcontracts.

Whenever the prime contractor abandons the prime contract or fails to pay the subcontractor his estimates as provided by the subcontract, the subcontractor is freed from any obligations under his contract but is in a position to claim the full benefits thereof. That may not, at first glance, seem particularly important but it can make any program of completion far more costly than indicated. This for three reasons:

1. You will have to pay in some fashion for the "move in and set up" cost of the new subcontractor.
2. At best, your liability to the old contractor will be asserted by him on the contract or on quantum meruit, whichever is higher, and your liability to the new one will include all the unknown risks of correcting defective work, resulting in substantial overlap.
3. The prior subcontractor, though he may not have received payment, will have, with the sympathetic cooperation of the prime contractor, squeezed everything he could into the prior estimates. It may be said that all contractors do their best to get their profit and overhead before the job is half done. The result is that the remaining work must be done at a loss, as compared with future receipts under the contract. For your purposes you may take this to be 100% true.

What are the means of minimizing this loss? Here is where the man with the power of decision and a book of drafts is indispensable.

You will proceed on the basis of keeping all contracts alive. You will be forced to do so if there remains a profit to the subcontractor in the incomplete work and you will want to if there is not.

All subcontractors will be asked to continue to perform for you *or your nominee,* as, at this stage, you will not know what arrangements for completion will be made. To secure this consent *in writing,* you must be prepared to clear up all defaults on the part of the prime contractor and that means payment (not promise of payment) of any unpaid estimates due him. You may find it advisable to excuse any non-compliance by the subcontractor with statutory or contractual limitations on your liability to him such as are contained in the Texas statutes.

If he will lose money in completion, and has already seen his lawyer he may laugh in your face. To guard against this it may be well to have sent a telegram to each subcontractor advising him that you hold an assignment of the subcontract and are prepared to remove any default in payment. If, upon approaching him, he declines to proceed because of the default, you are in a good legal position to tell him that he had not, prior to your telegram, given any notice of termination, that after the telegram, it was too late for him to do so, and that you expect to hold him to the contract and will pay no part of his past bill until you have found out what completion will cost which will be charged back to him.

Occasionally, of course, you will want to eliminate one or more subs because of defective work already done, lack of cooperation with other contractors, or even *just because the prospective new contractor or the architect on the job doesn't like him.* Don't hesitate to do so if any other person or concern will take over completion at any reasonable price.

Peddling Your Papers

If you have established an *entente cordiale* with the owner and his architect, it is generally sufficient to advise your obligee that you have worked out a definite program for him to follow; that in your opinion it is the best course to be pursued; that if he follows it, you, and not he, will be responsible morally and financially for the consequences up to the penal sum of the bond or bonds; but that if he pursues any other course not bearing your approval, he will leave you in the position to question the reasonableness of the cost of completion incurred by him.

Generally, it is sufficient to ask him to read his contract as to his remedies in the event of a default and to point out to him that this contract was what you guaranteed.

As a mattter of fact, regardless of the character of the new contract, a smart

obligee will insist upon a direct contract between him and the new contractor, for the reason that this will eliminate the delays and buck passing that will be inevitable in working out with some ignoramus in Hartford or Denver or Dallas, all questions as to work orders, directives, complaints, back charges, change orders and even progress payments and final settlement.

Choosing Your Coffin

The amount of your loss under this alternative is determined by your program of completion. Knowledge of the law, engineering and accounting will not be enough to enable you to assay the merits of any program. Business judgment is the prime requisite here. And no matter what course you may pursue, there may be some second guessing at the home office as to the correctness of your decision.

Remember, our first point was the necessity of speed and the consequent necessity that the man with the power of decision be on the ground. The second was possession of the facts. Of course, you should have all the facts before you act but you won't have them. Of course, you should have a couple of months in which to check all the figures and digest all the information and survey all possible means of completion. But a thousand dollars a day in liquidated damages may be at stake and all of your subcontractors may be pulling off the job while you are conducting a complete investigation. So whatever you do, reconcile yourself to the fact that, at the end, you will wish you had done something else, at least in matters of detail. This is because you only have a choice among evils.

Now there are various ways of completing a job:

1—Force account
  a—under the original contractor or one or more of its personnel,
  b—under entirely new supervision;
2—Advertisement and bids;
3—Cost plus a fixed fee;
4—Cost plus a reasonable fee;
5—Cost plus a percentage with a limit;
6—Negotiated contract with a reliable contractor.

There is no general rule to be applied. Each case his its own solution. Each method described will be the appropiate method in proper cases. If you choose force account,

Relax and Enjoy It

Ordinarily completion by force account is highly undesirable. Yet, in the last two major defaults we have handled we have notified the prime contractor that we would expect him to handle the matter in that fashion. The objection to force account is that there is no incentive to economy and no practical way to prevent the padding of cost or raising the standard of performance by severe inspection.

But when you have a subcontract bond situation involving a portion of the work which is badly behind schedule, the prime contractor has all of the additional equipment needed to put the job on schedule and there is a crew of men already on the job, no other contractor in sight is interested in bidding and it would take any of of such bidders sixty days to even cruise the job and the liquidated damages at the rate of $1000 a day are dead ahead of you, you have a situation where the obligee in his own interest will have to "shove" the job and, after all, it is almost axiomatic that the cost of a job is generally in inverse ratio to the speed of performance.

It is often important, either in this situation, or any of the others, that the defaulted contractor or his key personnel be tied into the completion in some fashion, either as actually directing the work, as office help, or merely as dummies. Their morale may be low but they can guide the sureties in such matters as change orders, back charges, credit memoranda and claims of materialmen and subcontractors, any one of which may be of prime importance in reducing your loss. We have seen a subcontractor's claim of $185,000 shrink to $85,000 on the basis of information given by the principal.

But, generally speaking, as above stated, "force account" is not desirable and any arrangement by the obligee and you for such a program should be understood to be terminable at will if, after a full survey of the situation, other arrangements for completion should be deemed preferable. Thus used, force account may be a very useful device for keeping the job going while you are making your survey.

The possibility of this procedure should not be ignored, particularly if you can control immediately or ultimately the supervisory personnel on the job

1. whenever the job is in the punch list stage

2. when the contract is a subcontract for a definite portion of fairly homogeneous work, or for other reasons, the reasonable cost can be fairly determined as against your obligee.

Illustrations of this are large dirt moving jobs, concrete flat work, some pipe line jobs, reservoir site clearing and some masonry jobs. Theoretically, painting should fall in this class, but the wide variations in inspection take this out of the class. A job being completed at the expense of the bonding company generally gets a "post office" inspection.

Your home office may be very skeptical about any such program. It falls in the same category as financing programs and your immediate superior will be able to cite to you horrible examples of work done on "force account" on other occasions, and it is a fact that practically never will your cost of completion be within your estimated limit.

One Massive Dose

The home office will much prefer a lump sum bid for completion for the following reasons:

1. Theoretically, under competitive conditions, when the work goes to the lowest bidder, it is being done at lowest cost.
2. The risk is ended, your loss liquidated, your reserves determinable, your reinsurers satisfied as to the extent of their loss, you are within the penalty of your bond and you can get back to your desk.
3. Your obligee may be quite discontented if you propose any other course, particularly if the bond involved is one of these hermaphroditic abominations known as Owner's Protective Bond.

For these reasons, whenever the work on one or more of the jobs involved is in the initial stages (say less than 20% complete), no serious consideration should ordinarily be given to any other method. Of course, this may make it necessary to shut down the job, take an inventory, advertise in trade papers for a reasonable (or statutory) time as if you are dealing with an original contract.

However, you can shorten the time required by shutting the job down and asking for proposals from three or four reliable contractors, leaving them to inventory the material on hand and the work done. All requests for proposals should by reference or otherwise include performance in accordance with the original plans and specifications and should leave nothing for discussion, to the end that there will be a basis for accurate comparison of proposals. Whatever is omitted from a proposal for the purpose of arriving at an apparent low figure, will ultimately be made the basis of negotiations in which you will lose your socks.

Proposals may be sought from

1. Any of the original bidders whose prices were in line with the award.
2. Any reliable contractor then engaged in similar work in the neighborhood,
3. Any other reliable contractor who, according to your information, is running out of work.

In determining the contractors to be invited, it is desirable that your obligee and his architect be consulted. Don't try to wish off on your obligee any contractor to whom he objects but give the contractors of whom he approves a good break.

And don't overlook the possibility, in dealing with subcontracts, of making a deal with the prime contractor that will get you off the hook.

It will be remembered, of course, that under Alternate Four under discussion, you will not yourself award any contract. You will pass it to the obligee with your approval and request that he enter into the contract.

It must not be thought, however, that there are no valid objections to the reletting of contracts by advertisement and bid. Basic objections to such a program are that it involves

1. cessation of work, continuance of overhead, equipment rentals and the like,
2. new moving in costs,
3. possible loss of all subcontracts,
4. the loading of bids to cover correction of work already done,
5. possible adverse competitive situations.

Any one of these matters may be controlling. Cessation of the work may run the job into winter or a rainy season and quadruple your costs and liquidated damages may be serious.

Moving in may mean the transportation of heavy equipment from distant states.

It may take ninety days to even estimate the job. Imagine a clearing contract for 23,000 acres of heavily timbered reservoir site with the contractor to get the timber!

But if there is any one thing that most frequently adds to costs of completion, it is the loss of the original subcontracts. You may have to pay for the completed work under your payment bond on a quantum meruit basis which may double the bill and, under your performance bond, you may have to pay twice as much for the incomplete work as the architect's estimates indicate. We have seen $19,000 worth of electrical work go for $89,000.

Every bidder will load his bid to cover his exposure to liability for defective work. He doesn't know whether there is any, or how much this will cost him, but he remembers a case where a subcontractor stubbed off foundation piers into mud instead of going to rock and all of us have had estimates of cost for $5,000 for corrective work when the estimator wouldn't offer to do it for $10,000.

The competitive situation may be very serious. All of us have seen the enthusiasm with which people tend to "put the big britches" on a surety company. And in some communities there is an express or tacit agreement to wreck any outsider who attempts to inject himself into the local monopoly. Often material suppliers and local labor bosses are tied into such a program. They hope to teach the "so and so" surety company not to make bonds for any outsiders. They have just been waiting (and stirring up trouble while waiting) for the day when you will be groveling on their door step for relief. You can get it but only at their price. Electrical subcontracts seem to me to be the worst class in this respect.

Other Ways of Skinning A Cat

For these reasons it is often advisable to explore the territory between "lump sum" and "force account" for an answer to the problem. This will include completion for cost plus a fixed fee, or plus a percentage with a fixed limit, or plus a reasonable fee, as well as limitations in the new contract on responsibility for corrective work or the work of one or more subcontractors.

Early in the game, let us hope, you will have made contact with concerns interested in completion. You have a hasty estimate of such costs from your engineer who will be giving prime attention to refining these estimates as well as assisting you in your negotiations with the subcontractors for their agreement to go forward with their existing contracts. With such agreements reduced to writing you are now in a position to ask for bids, solicit proposals on a lump sum basis or to begin negotiations for one or more cost-plus-fee contracts.

As above pointed out, the architect can be helpful or can be a pain in the neck. The main thing you will want from him is a careful inspection of all work theretofore done and a report on any defects. He may take the position that his fee does not include any such work. You may assure him that, in your judgment, if he does the work with the owner's approval, he will be entitled to add to his fee, for which your bond is responsible. Never offer to pay him on the side. As above indicated, it is desirable that the architect *cheerfully* cooperate, and such cooperation, by the use of tact, you may obtain. You are probably entitled to such an examination, in view of the legal principle, that an owner may be estopped to complain of defective work, if he permits the work to proceed, without complaint of defects in the underlying work. But such an inspection and report obtained by threats will be a very disappointing document. Nothing will have been done properly.

A fully cooperative architect will make such an inspection cheerfully, and will point out anything visible which may need correction, particularly if you assure him that neither he nor the owner will be concluded by his report insofar as concealed defects are concerned.

With such an architect and such a report, you will be in a good position to seek lump sum bids. If you are unable to secure such a report, you should consider excluding corrective work from the new party's contract, advising the owner that you remain liable under the bond for a complete job and will arrange with this contractor or some other contractor to do such corrective work as may be required. This may be objected to by the home office as not liquidating the loss but with your engineer's assistance you may be able to convince it that the certain saving is far more important than the risk of additional cost. To point this up, you might ask for offers with and without the cor-

rective work. If he will do the job for $50,000 without responsibility for any corrective work but asks $75,000 if he is to take such responsibility and your engineer says that all the preceding work is in good shape, it would be a crime to kick off the $25,000.

Your final decision in the method of reletting is where you are confronted with a major demand on your business judgment. Your lawyer, engineer and accountant may help, but the answer is the end product of all known factors, with the knowledge that your limited time is hardly ample to enable you to carefully appraise all factors. There may be several contracts and all may require different answers. Unless the subcontractual situation is such as to demand primary consideration, the major factor in arriving at an answer will probably be the stage of completion. Assume that you have four contracts, respectively 9%, 90%, 99% and 99.9% complete, exclusive of work under subcontract. You will probably want a lump sum bid on the first, cost plus a fixed fee on the second, cost plus a reasonable fee on the third, and force account under the architect or the superintendent on the fourth. Only the lump sum contract will require a bond.

Dealing The Cards

Whatever proposal you receive and approve, you will now reduce to a letter addressed to the obligee. You will take to him

1. The admission of default,
2. The new proposal signed by the new contractor *addressed to your obligee,* and
3. A letter to the owner requesting that he accept the proposal and guaranteeing to him that
   a. in doing so, he is within his legal right and
   b. that your bond remains available to him until final acceptance, even though the new contractor also makes bond.

If you have succeeded in securing the confidence of the owner, and kept him advised of your activities, this session should be very brief. He will accept your proposal. Your contractor will present any bond required and be ready to take over. You will now be in a position to start checking the claims with the assistance of the defaulting contractor and any of his staff needed for the purpose (who will be paid by you from this point on), and of your own engineer, accountant and lawyer.

You should be prepared, simultaneously with the execution of the contract by the owner, to make payment to him of his loss as liquidated by the reletting, if relet on a lump sum basis. Sometimes, it may be more economical to pay the difference to the new contractor and have him take the job over at the original price. He may figure closer if he can operate on your money.

If you have been compelled to adopt the device of arranging with the contractor to sublet the remainder of the work to a new contractor, either on a lump sum basis or other approved basis, you should have in mind the fact that the contract secured may forbid a reletting or limit the proportion of the work that may be sublet and probably forbids an assignment of the proceeds. In the case of federal contracts, you may find that these proceeds have already been assigned to some bank.

The mechanics of handling this variant of the solution will probably include:

1—The negotiation and preparation of the subcontract itself;

2—an irrevocable "letter of directions" from the old contractor to the obligee directing that all checks representing proceeds of the job be sent in care of the new contractor (or his bank, if so desired);

3—a power of attorney from the old contractor to the new contractor, authorizing him to endorse such checks and appropriate the proceeds;

4—a separate power of attorney or letter of authority from the old contractor addressed to the obligee, designating the new contractor as his representative on the job with full authority to bind him in all dealings with the obligee relative thereto;

5—a letter from you to the new contractor detailing the arrangements for payments to him at appropriate intervals of amounts earned under his subcontract but not covered by estimates received from the obligee. This letter should include your commitment to him to protect him against all claims against the original contractor which are not to be assumed by him. We add here

that it will be ordinarily desirable that the new contractor take over all subcontracts, assuming the obligations to make the payments on them in accordance with the terms thereof, excepting, of course, such amounts as have theretofore been paid by the original contractor or by you.

If there are any outstanding assignments, it will be necessary to make appropriate arrangements with the assignee which will fully protect his legal rights but free the future proceeds of the contract. If a reasonable proposal is not accepted by the assignee, he can ordinarily be eliminated from the picture by the presentation to the obligee of the admission of default followed by notice by the obligee to the contractor of an intent to terminate his right to proceed further with the work. This notice should be in accordance with the terms of the contract which ordinarily allows a short period of time for the removal of the default. Such a move is ordinarily sufficient to bring the assignee to a realization of his position.

If you fail in this, you will probably have to let the default become final and renew your negotiations with the obligee, although theoretically there are ways of carrying out such a program if the savings to be effected thereby are important enough. The execution of the subcontract will probably suffice to put the new contractor ahead of the assignee, and his rights and the rights of the surety, perforce of the principle of subrogation, may be enforced in a friendly (or unfriendly) receivership suit against the original contractor to which the assignee will be made a party.

Sweeping Up The Crumbs

Somewhere along the line of your negotiations, particularly with your principal, the matter of salvage will come up. As above pointed out, you are entitled to the proceeds of all contracts bonded by you and you should not overlook any means of protecting these rights but you have no more right to the other assets of the contractor than have the other creditors, and if you succeed in securing assignments, conveyances and mortgages covering such other assets, they are subject to being taken away from you by a bankruptcy court in the event a petition is filed either by or against your principal within the next four months. We do not mean to suggest that you should not investigate or attempt to get the benefit of outside assets, but we do think that you should not let such an investigation or attempt divert you from your main objective, which is to minimize your loss. While you are taking a second mortgage on a worn-out concrete mixer, another subcontractor may have pulled off the job and gone to see his lawyer.

So What?

These, therefore, are the points we would emphasize:

1. Get on the job fast.
2. Grasp the situation firmly, listen to your principal and the obligee pleasantly, but make your own decision or have someone with you who has the power to make any decision final.
3. Deserve and obtain the confidence of the other interested parties.
4. Do nothing final until you have your admission of default and letters of direction.
5. Have a book of drafts with you and the right to use it.
6. Do not be technical about your liability for the last week's payroll and the miscellaneous items necessary to keep the project rolling and your negotiations in progress.
7. Remember that subcontractors may have you by the throat.
8. Don't let salvage be your first consideration.
9. Brace yourself for the second guessers.

Justice or Appeasement for Tort Claimants*

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Daniel Webster once said, "Justice is the great concern of man on earth".If this is not true universally, at least it is true where democratic governments exist. Without a dedication to the cause of justice—in every aspect of life—a free society cannot come into being or, once established, endure.

Justice is defined by another Webster, in the sense that we use it here, as "the establishment of a determination of rights according to the rules of law and equity." And, in its philosophical context, Webster defines it as "the principle of rectitude and just dealing of men with each other; also conformity to it; integrity; rectitude—one of the cardinal virtues."

Appeasement is defined as "pacification; satisfaction". The verb appease means "to reduce to a state of peace, to pacify, often by satisfying demands; hence, to make quiet or calm." Since Munich, it has come to mean, "yielding to pressure".

There are many today who ask, "Is this what is happening to our courts, under the pressure of floods of tort claims?"

The charge is made that too often interest is not in justice but rather its pacification. Should justice be pacified? Should it be made quiet or calm? Should it be compromised or appeased? Should it yield to pressure?

Perhaps it would be more accurate to say, in the language of legal pleading: Now comes human society, the plaintiff herein, and for its cause of action against the defendants says that man has been negligent toward society by frequently ignoring, compromising or appeasing justice when he knew or should have known that in so doing he deprives society of the benefits of justice and thus endangers its welfare.

A large segment of the responsibility for insuring justice among the daily affairs of men—in our country at least—lies within our courts. Once in court, the responsibility of seeing that justice is done falls not only upon the judge, but also the jury, the trial lawyers and their clients, and, yes, the newspapers.

Justice does not always mean that a case should be tried. By the same token, justice does not always mean that every case should be settled without trial.

One of our difficulties is that too often there is more interest in the expedient settlement of differences between litigants than in a judicial determination of rights according to principles of law.

The jury system has been overpraised and overmaligned. There is no fool-proof method of insuring a jury's impartiality or sense of justice. Mostly, one must rely upon the basic sense of fair play which most citizens possess who are called for jury duty. The court itself can aid materially, the lawyers, too. Both have a valuable role in weeding out those with obvious prejudices or inadequacies. Fundamentally, the tone of the courtroom is set and controlled by the judge. That tone can help justice or hinder it.

Some judges, lawyers and laymen blame the jury system as inefficient and unenlightened in our administration of justice. It is true that juries are cumbersome, and one cannot deny there are times when technical issues might better be decided by the court, or a referee, or court-appointed experts.

Juries are unpredictable, they say—and they are, if you mean the reasoning process by which they reach a decision; or, juries are frequently pro-plaintiff, and they are, if you mean that their natural human sympathies lean toward a genuinely injured plaintiff. However, as one who travels primarily the lonesome road of defense counsel, I am convinced that no element of our system of jurisprudence has a higher batting average in resolving issues justly than do our juries. If juries reach wrong verdicts—and occasionally they do—it is less their fault than that of the lawyers and judges in the preparation and trial of the case, or of legislators in establishing the procedure by which the trial of the case is governed. Furthermore, if a jury goes haywire, their errors are unlikely to be missed by the trial judge, or three (Ohio) court of

*A combination of two articles previously published in the Ohio State Law Journal and the Cleveland-Marshall Law Review.

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appeals judges or seven judges of the (Ohio) supreme court.

The trial lawyer has a dual role. He must be an effective advocate on behalf of his client and also serve as an officer of the court. Sometimes the two roles come into conflict, whence the age-old query: Is the lawyer's duty first to his client or to the law? Too often forgotten is the fact that lawyers, as officers of the court, not only have a responsibility to their clients, but also, as with judges, they are charged with the larger responsibility of a public trust.

Certainly the trial lawyer who enters the courtroom with any other thought than to see justice done becomes a shyster and quack. By the same token, any lawyer who is afraid to give battle should remain at his desk where he can enjoy the luxury of more lucrative, less arduous and much duller matters.

What of the client? His interest rarely is objective. Justice to him is what he wants. His outlook is conditioned by his experiences, be they individual or corporate. But when the client loses perspective, usually his lawyer can correct the distortion, if he assumes his proper role.

And then, there are the newspapers. In the courts, the bench and the bar work in a fish bowl. It is public business. The courtroom offers much of human interest and I share, in general, the newspapers' view that the public has "a right to know" what goes on. Unfortunately, much newspaper reporting is concerned only with what the newspaper considers "news value". I refer, for example, to the almost universal reporting of high verdicts in personal injury actions and the almost universal failure to report when a defendant wins or when the verdict is less than the amount plaintiffs could have received by settlement. The result is to encourage litigation that should never be brought. It gives false hopes to plaintiffs and increases the cost of litigation. It diminishes the possibility of settlement without the necessity of a lawsuit being filed or even of settlement after it is filed. When lawsuits are first filed, the tendency of the newspapers is to play up those cases which ask for large amounts, quite forgetting that the only limit upon the amount a plaintiff can ask in any personal injury or wrongful death case is the judgment and the imagination of an attorney. Suits for $50,000 to $100,000 are common. Suits for $500,000 occur fairly often, and of course when one is filed for $1,000,000, it is bound to receive newspaper coverage. In rare instances only, does the public later learn that most of these prayers go unanswered.

Appeasement of justice is a problem primarily in the personal injury cases that compose such a large part of the jammed court dockets in the metropolitan centers of the country. The increase in personal injury lawsuits stems, of course, from the evolution of the mechanical age, particularly the automobile, and the rapid growth of the casualty insurance industry in response to a social need. Insurance protection today makes justice more available to the litigants on both sides. It makes it possible for plaintiffs who have a just cause to be compensated and provides resources for defense when the cause is not just. Such it can be. Such it not always is.

Actually, a strange cold war is going on. In one corner you have the plaintiff: that innocent, poor, horribly injured, mangled or mistreated individual. In the other corner is that rich, callous, soulless defendant. In most instances, among the background overtones, is that merciless remnant of capitalism, the hard-hearted insurance company. Plaintiffs' attorneys have their own organization, the National Association of Compensation and Claimants Attorneys, more familiarly known as NACCA. On the other hand, most of the active defense or insurance counsel are members of the International Association of Insurance Counsel. Occasionally, they will try a plaintiff's case. Only on rarest occasions do specialists on the plaintiff's side ever represent the defense.

Originally, NACCA's purpose was to make certain that their clients would receive an "adequate award". More recently their concern is with "the more adequate award". You might ask, "What is more adequate than an adequate award? Is not an adequate award fair and just?" In contrast, insurance companies and their counsel are interested in keeping down the amounts of the settlements and verdicts, but where an honest effort is made by both sides, agreement can be reached as to what is fair and adequate. Perhaps there never shall be agreement as to what is a fair award to a plaintiff, but at least both sides should be concerned solely with whether or not, under law, justice indicates that the plaintiff is entitled to anything and if so, then a reasonable amount.

At some stage every lawsuit merits con-

sideration of its settlement possibilities. However, too often a lawsuit becomes nothing more than a cynical device designed to force settlements regardless of the merit of the legal issues. Settlement negotiations in turn too frequently become an open and bald appeasement of justice encouraged by the plaintiffs, aided by their lawyers and abetted sometimes by the defendants and their counsel, the courts and newspapers. As a result, plaintiffs are being paid in many cases without regard to the legal responsibility of the defendant.

All kinds of reasons are given to justify the procedure: "My client was hurt wasn't he?", avoiding the expense of trial, fear of what a jury will do or fear, even, of a particular judge or one of the lawyers. This leads to expediency in the place of justice.

Because plaintiffs can file suits with impunity, regardless of their legal merit, expediency becomes involved when an insurance company offers to pay something to avoid the expense and gamble of trial, even though it is convinced that the defendant is not responsible for the plaintiff's injuries or that the injuries claimed do not exist or at least are exaggerated, and then there is expediency when the plaintiffs press for payment simply because the plaintiff was injured, regardless of the question of fault.

Not long ago I asked plaintiff's counsel to give me one good reason why the defendant should pay anything in the particular case because I could see no legal liability. His answer: "The plaintiff was hurt, wasn't he?"

Then there is the expediency of the court, harassed by clogged dockets, interested only in getting the case settled and pressuring the defendant to make some payment, regardless of liability, simply because the defendant has insurance or because the parties should avoid the expense of trial. I once heard a *judge* say that *because the defendant is covered by insurance a settlement should be made.* Most juries assume that insurance exists in most cases, but I find that it has little, if any, effect upon their verdicts. Should the presence or absence of insurance be permitted to influence a judge's interest in settlement? In passing, it should be noted that in many instances insurance coverage is less than the amount of damages the plaintiff seeks or there may be a serious question of coverage.

It is said that in the "good old days" courts would direct verdicts. Whether it was different then than now, I do not know, but at least now a directed verdict is rare indeed. In this connection the following comments of Mr. Justice Frankfurter may be of interest. In *Wilkerson v. McCarthy,* 336 U. S. 53, 65, L. Ed., S. Ct., he said:

> "If there were a bright line dividing negligence from nonnegligence, there would be no problem. Only an incompetent or a wilful judge would take a case from the jury when the issue should be left to the jury. But since questions of negligence are questons of degree, often very nice differences of degree, judges of competence and conscience have in the past, and will in the future, disagree as to whether proof in a case is sufficient to demand submission to the jury. The fact that a third court thinks there was enough to leave the case to the jury does not indicate that the other two courts were unmindful of the jury's function. The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge."

We all know that in order to direct a verdict the court must construe the evidence most strongly in favor of the plaintiff. One wonders sometimes whether this doctrine—which is perfectly sound—has been extended to mean that, in applying the law to the facts, the law as well as the facts must be given that interpretation which is most favorable to the plaintiff.

Fear of what a court or jury will do or the economic cost of defending should not determine the outcome of who is right or wrong in a legal action. Doing so encourages more lawsuits being filed without regard to merit.

I thought one of those occasions had arisen a few years ago. A matter came to my care which on its face appeared to be a ludicrous situation.

Mr. Plaintiff had sued my client, Mr. Defendant, claiming that my client had thrown some over-ripe food on his house, causing slight stains. The evidence appeared the day after Halloween. He asked $50 for actual damage and $1,500 for

punitive damages. The plaintiff was unpopular in the neighborhood, with a reputation of a trouble maker. All of the people on the street owned their own homes, except for the defendant. The plaintiff called him a "damned renter". Most of the neighborhood were foreign born. The defendant was not, but his neighbors rallied around him, morally if not financially. They knew that in spite of provocations by the plaintiff, the defendant would not engage in such petty nonsense. Furthermore, there were stains on the defendant's own house, also, the day after Halloween.

The defendant had no insurance and a modest income from which he was trying to save enough money to buy a house.

At one time the case could have been settled for $25. Even by keeping fees to a minimum, the cost of trial alone would run between $400 and $500. The defendant refused to pay one cent. We went to court, with an array of neighborhood witnesses. Through the good offices of the court, the plaintiff was persuaded to dismiss the case. My client was right. Justice was done because Mr. Defendant insisted upon fighting for a principle. He did not whimper about possible trial expense rather than paying $25. *He would not let justice be appeased.*

In all metropolitan areas the time has been increasing between the date a lawsuit is filed and when it is reached for trial. In the Cleveland area it has ranged from two to three years. In New York City it runs between three and four years. Too long a delay between the filing of a case and its trial is a denial of justice to both the plaintiff and the defendant. Some 70 to 75 per cent of all civil cases filed in the Common Pleas Court of Cuyahoga County involve personal injury matters. Of all of the cases tried to a jury, approximately 90 per cent involve the law of torts.

It is entirely natural for judges to be concerned with clogged dockets, but clogged dockets are not a justification for urging settlements. Might it not be better, for example, to find ways of discouraging the filing of worthless lawsuits? I have in mind a case where the plaintiff claimed injury on certain property. The defendant did not own or have anything to do with the area where the injury occurred. If this was not known to the plaintiff at the time of filing the suit, it was known later. Nevertheless, the defendant was forced to the expense of defense and, at pre-trial, the court urged the defendant to pay something to get the case out of the way. The defendant refused. Eventually, plaintiff's counsel dismissed the case.

Or take the case where the plaintiff and a friend were driving on a three-lane highway. The friend admitted having stopped at a tavern for drinks. It was dark. The plaintiff's car, which was going west, crossed the road and ran into a car going east. The eastbound car at the time of impact had pulled as far to the righthand side of the road as possible. The plaintiff sued the driver of her car and *also* the driver of the car that was coming from the opposite direction on its own side of the road!

Perhaps the answer is the system used in Canada. There the plaintiff can agree to pay his lawyer on a flat fee, time or contingent basis. If the plaintiff wins, then the fee of plaintiff's counsel is taxed as cost against the defendant, the fee being subject to approval of the court. If the defendant wins, the defendant's legal expenses are taxed as costs against the plaintiff!

The defense lawyer is in the enviable position of never starting litigation, although it should be noted that sometimes lawsuits have to be filed by plaintiffs because the claim was appraised incorrectly. Of course, such action forces the claimant into the eager arms of a plaintiff's lawyer. More frequently the plaintiff already has a lawyer who deals directly with the insurance company before filing suit. Some plaintiffs' lawyers make a practice of filing suit first and negotiating later, sometimes not until pre-trial or even the trial room.

In a recent case an accident occurred approximately a year ago. A pedestrian was hit under circumstances that could result in a verdict for the plaintiff or the defendant. One hospital found no evidence of injury. Another reported bruises and shock.

The insurance coverage limit was $5,000. The adjuster sought to settle the case, but could obtain no demand, and the pedestrian and her husband refused to provide any medical information to support her complaints. After several contacts by the adjuster, the claimant each time refusing to discuss settlement, he was told finally to contact her attorney. The adjuster reported, "We have never been able to settle any claim with him this side of a lawsuit and

know of no other adjuster who can do so, unless he gives him his shirt." Thus, another lawsuit was born.

Recently an insurance company client called for advice. The company received a letter from a lawyer stating he represented Mr. X. The insurance company called its assured to point out that this was the third claim that had arisen recently in connection with the insured property. The insured knew the claimant and on his own spoke to him. He found the claimant had never spoken to the lawyer and did not even know him. The claimant gave a sworn statement to that effect and signed a release for a settlement. Thus, a potential lawsuit died.

Of late, some proposals have been made to take automobile cases out of the courts. While there are more automobile casualty cases than any other type, the proposal would tear the house down to repair a leak in the roof. It is no solution, at least not until it is decided, after careful analysis, that disputes between strangers cannot be decided upon principles of justice.

In the Saturday Evening Post for October 22, 1955, Judge Samuel H. Hofstader, a trial judge of the New York Supreme Court (equivalent to Ohio's common pleas court) gave his name to an article called, "Let's Put Sense in the Accident Laws." Judge Hofstader says:

> "After more than 20 years on the bench, I am convinced that it is time—well past time, in fact—to get automobile-accident lawsuits out of our overburdened courts and to dispose of them in a sound and up-to-date manner patterned after the universally accepted system of workmen's compensation. This, as I will explain later, would mean that anyone injured in such an accident would be assured of the compensation within a short time and on the basis of established payment schedules administered by a state board, without regard for the question of who was at fault in the accident. Such a system would eliminate the risk that injured persons, after years of litigation, may get no compensation at all, and it would, in my opinion, be fairer to all who become involved in an accident.
>
> "As a judge, I have no hesitation in saying that in our modern civilization almost anyone, including yourself, can end up in court in connection with a suit to recover damages suffered in an automobile accident, no matter how carefully you drive or even if you don't drive at all. And once you are in court you may well find yourself in for some real surprises."

Judge Hofstader then selects as surprises examples which certainly are not typical of the vast majority of cases that are tried. He disagrees with the law as it applies to a certain case or he notes that it took three years to reach trial and another year before the appellate court made a ruling. Or that a jury cannot determine between "just plain negligence and gross negligence." He then adds, "and anyway, what difference does it make to the 'guest' who has lost a leg in the accident?"

Judge Hofstader goes on to say:

> "The concept that an automobile accident is due to individual fault is utterly unrealistic in modern civilization. It defies common sense and everyday experience. It fails to consider that, from an acturial standpoint, such accidents are inevitable and that they should be considered on the same legal basis as accidents that occur in factories. Or, let me put it another way: Society demands and needs the automobile and, in fact, could not do without it any more than it could do without our great industrial plants. Experience shows that no matter how carefully people drive or how stringent the traffic laws there will be automobile accidents. Therefore, society must accept collective responsibility for such accidents. They are a common burden of our society and should be dealt with on a collective rather than on an individual basis, due to their unique character in our social and economic life."

Judge Hofstader's plan may sound socialistic. In a sense it is. But I doubt that it is any more so than the workmen's compensation laws to which he refers. Whether we like the socialism of 't or not, the fact remains that if our American ingenuity cannot devise a better way of meeting the problem, then the day may come when some such program will be undertaken in some states. It seems to me, however, that Judge Hofstader overlooks a number of considerations. In the first place, he favors some state system of insurance, without first inquiring as to whether there are ways in which we can improve our present ad-

ministration of justice. His plan presupposes that a person should be paid just because of injury, regardless of whether it is due to his own negligence. If his theory is sound, then why stop with automobile cases?

The honorable judge emphasizes the plight of our overburdened courts. Some not very complicated administrative changes in procedure would correct much of the situation. Furthermore, his plan would hardly aid the court dockets. In Ohio, for example, our last legislature passed a law that now permits a workmen's compensation claimant to have a jury trial *de novo,* if he is dissatisfied with the rulings of the Industrial Commission. Formerly the record of testimony before the commission was the basis for an appeal to the common pleas court. Now the issues must be retried as though there had never been a hearing. These are some of the cases that are jamming up our own court docket.

The error of many lawyers and judges is to underestimate the intelligence of juries. Juries are much more sophisticated and much more capable of resolving differences than most people realize. Or, if the law being applied is not sensible, then the recourse is with the legislature.

There are many improvements that can be made. For example, let us improve our pre-trial system such as has been done in Cuyahoga County, Ohio, whereby the parties and their counsel present to the court what they expect to prove, determine those things about which the lawyers can stipulate in order to save time at trial and then, after these considerations have been discussed, explore the possibilities of settlement. The time required to try lawsuits can be reduced.

We can improve court procedures regarding pleadings and the discovery rules. Where two separate law suits are filed for personal injury and loss of service, we can require their consolidation. We can reexamine the total administrative machinery of the courts, as was done in New Jersey. We can screen out worthless cases. Where liability is absolute, some method of arbitration could be set up to determine value, assuming pre-trial efforts fail. The length of trials can be reduced by submitting technical questions to impartial panels of experts for findings. We in Ohio can pay our judges higher salaries, provide a decent retirement system and give the judges better facilities from which to handle their work. We can consider the advisability of setting limits on the amounts the plaintiff can recover for different types of injury.

We can explore the possibility of bringing some balance between the value of an arm or a leg in Cleveland and what it is worth in other parts of the state. On the other hand, if I lose my hand or arm through no fault of my own, the dollar compensation should be less than for a baseball player or a musician.

And then, outside of the courts, there is, of course, endless room for attention to such questions as highway safety, safety practices in general and the training and licensing of automobile drivers.

In view of the increase in the number of municipal courts we can eliminate the overlapping of jurisdiction between them and common pleas courts by having the common pleas court jurisdiction begin where the municipal court jurisdiction ends. The bench and bar also can work upon the improvement of the rules of court to the end of expediting the trial of law suits.

Most important of all, we must decide whether the handling of personal injury claims and lawsuits is to be on the basis of the rights of litigants according to law or according to expediency.

Some people say: "Why worry about a little expediency? Being governed by the law may be a fine theory, but if people want to resolve their differences, regardless of the law, why prevent them?" One must concede that there is some merit to this view, so long as the appeasement of justice is condoned. But when does one break out of the circle?

Need it be said that any important disrespect or disregard of law, democratically made, endangers you and me and our right to live as free citizens in a free country. The type of appeasement of justice which I have been discussing is insidious because its slow erosion upon the concepts of justice brings forth no cries of alarm.

The absurdity is that the solution is simple. In general, I refer to abolishment of nuisance settlements. The policy of paying a claimant or his lawyer something just to avoid the probability of a lawsuit does nothing but encourage groundless claims and encourages the view that mere injury entitles one to compensation from someone else regardless of respective fault.

A few years ago, a St. Louis chain store told its insurance carrier to stop making nuisance settlements. The insurance company told the chain store to run its business and the insurance company would handle the insurance problems. The chain store then cancelled its insurance and became a self-insurer. Within one year the number of claims and lawsuits dropped dramatically because the self-insurer instituted a firm policy of no payment without liability.

Insurance companies could outlaw nuisance settlements, but the initiative is entirely theirs. The general public needs education. The newspapers and other mass media can be of much help. Lawyers for both plaintiffs and defendants *could* stop the nuisance business. Most effective of all, I think, are the courts themselves. Where there has been a genuine use of pre-trial procedure, it has replaced appeasement with justice. Acceptance of nuisance money by a plaintiff or payment of it by a defendant necessarily involves an acknowledgment that either the plaintiff does not have injuries as claimed and/or there is no legal liability on the part of the defendant.

An effective pre-trial system is not the sole cure, but it can be a significant aid in meeting some of our problems. Pre-trial can do much to produce a fair result, fair to the plaintiff and fair to the defendant, whether the case is tried or settled.

Specifically, what are the elements that make pre-trial effective? In the first place, pre-trial objectives rule out any kind of coercion. Secondly, settlement, if it occurs, comes only as a by-product. Finally, as in the Common Pleas Court of Cuyahoga County, (Ohio) there are certain essential requirements and, to the extent that they are accepted and applied by the pre-trial judge, the procedure is effective. The most important of these are: that all of the real parties in interest must appear; an informal conference is held between the court, counsel and litigants which involves a discussion of the issues of the case and, insofar as possible without prejudicing the rights of either party, there is an exchange of information (such as medical reports, statements of witnesses and photographs). Once the foregoing is done, *then* and *only then,* do settlement discussions take place. If the case is settled, that ends it. If not, then there may be further pre-trial hearings. In any event, there is need on the part of the court and counsel to see that the results of the pre-trial are followed through.

When a settlement results from the pre-trial, no party should complain that it is not fair or not based upon the law, because the pre-trial procedure permits the clients and their lawyers to appraise the pros and cons of the case, both as to the evidence and the law. Underlying the pre-trial procedure there are, it seems to me, certain guiding principles for the court and counsel alike.

These guiding principles are:

1. *Has the plaintiff made out a cause of action?*

The first consideration should be whether the plaintiff has made out a cause of action. If not, then nothing should be paid, regardless of the nature and extent of the damage. In doing so, defense counsel must take the calculated risk that there are some trial judges who send every case to a jury, and thus the only recourse is the wisdom of the jury or to seek relief from the appellate courts.

2. *Where the evidence leans more heavily in favor of the defendant, but conflicting testimony will require the facts to be sent to a jury, then the case may have a modest value.*

Do not fear the juries. It may be a defense lawyer's opinion that his client is not liable even though there is no doubt that there is conflicting evidence that will require the facts to be sent to the jury. A typical example: Who was over the center line? In such a situation, no lawyer can be positive that a jury will find in his client's favor. The question is the extent to which each lawyer has confidence that the evidence will convince the jury to accept the facts that support his client's position.

In this situation, usually the plaintiff's case has some value, assuming the alleged claims of injury are legitimate. Even when there is a jury issue, there may be rare occasions when a case has no settlement value.

3. *Where the evidence leans more heavily in favor of the plaintiff, clearly the case has settlement value and the pocketbook must be more generous.*

Be willing to recognize when the odds are against you. Obviously, it is important for the defense to weigh objectively the plaintiff's evidence, and

vice versa. If the odds are in favor of the plaintiff, then the pocketbook must be more generous. It involves a dispassionate consideration of a possible minimum and maximum amount a jury is likely to render. This, of course, is dependent upon many different factors, some legal, some psychological. Cases are lost by both sides not only because of failure to prepare the case thoroughly or to be objective in arriving at legal opinions, but also from failure to be accurate in judging the psychological subleties of the case. This applies just as much in settlements as in the trial of a case. It has direct bearing upon the amount a plaintiff will receive or how much a defendant pays.

4. *Where the liability is absolute, then usually the only question is, how much?*

Finally, there are the cases in which the defendant's liability is absolute. In these instances, the only question is to appraise the reasonable value of the damages. On the one hand, defendants sometimes fail to be realistic in the opposite extreme. If settlement fails, the defendant frequently can cut down the time of trial and the amount of the verdict by being willing to admit negligence and/or liability so that the only issue for the jury is either proximate cause or the amount that the case is worth.

Reaction to the above principles may well be that they are sound in theory, but impractical; that they tend to force cases to trial and thereby increase the cost of defense. Such fears are not supported by the facts. The chain store, to which reference was made earlier, reduced the number of lawsuits filed against it by about 50 per cent within one year after adopting a policy of no payment without liability.

There is another instance where an insurance company kept a record of 48 cases that went to trial between the years 1949 and 1953. The cases were tried in Columbus, Cleveland and outside of Ohio. The company found that the amounts it finally paid out, including attorneys' fees, were nearly $200,000 less than they would have been had they accepted the lowest plaintiff's demand at the trial table.

I am sure the following results are typical of any office that does a substantial amount of defense work. The figures are based upon cases disposed of during a period of 40 months:

Settled before pre-trial	49.10%
Settled at pre-trial	16.73%
Settled after pre-trial but before trial	16.96%
Settled at the trial room but before a jury was impanelled	2.51%
Settled during trial	3.70%
Verdict for plaintiff	2.75%
Verdict for defendant	4.66%
Directed verdict for defendant	.84%
Defendant's motion for summary judgment granted	.36%
Other, such as demurrers sustained, motions to dismiss granted, dismissed with and without prejudice	1.67%

Some additional figures that may be of interest show that in 69 cases that were tried to conclusion the total of the lowest settlement demands was $891,403. The total amount paid out by way of verdicts or settlement after a verdict, including attorneys' fees, was $388,272, or $503,131 less than if the total amount of the demands had been paid. $150,000.00 of the total of $388,272 that was paid out represented the full amount of the policy limits that had been offered prior to trial.

Need justice be pacified? Should it be made quiet and calm? Should we abolish the jury system? Should we tear down the house to repair a leak in the roof? Or should we make a thorough study of the administrative structure and problems of our courts? Should we continue to perfect a pre-trial program? Should we take a new look at "nuisance settlements"? Can we find ways of discouraging lawsuits that any responsible lawyer would recognize as having no merit?

Should justice be compromised or appeased?

Summation To The Jury*

J. Mark Wilcox**
Miami, Florida

WHEN I received the invitation to talk with you on the subject of "Jury Arguments" or "Summations to the Jury," I hesitated to accept because I have talked on this subject on two occasions—once before the State Bar Convention, and once before the Dade County Bar Association. I tried jury cases within a few days after each of these speeches and in each instance took about the worst licking I ever received in the trial of any cases. It so happens that I have another case for trial immediately following this talk. It may be that I will again demonstrate my own lack of effectiveness in presenting jury arguments.

In this age of specialization, the general practitioner in the law, as in medicine, is rapidly disappearing. There was a time when at least the majority of lawyers devoted most of their time and efforts to the trial of litigated cases. In country counties, when the session of the courts began, the people gathered up from far and near to listen to the speeches of the lawyers, particularly in criminal cases. The lawyers used the occasion for showing off their oratory, which usually consisted of liberal quotations from Shakespeare and the Scriptures. Each case became a great dramatic production, although the matter involved may have been of very little importance. The jurors and the public expected the lawyer to pull out the stops and cover the entire range of human emotions during the course of his argument, though the suit may have involved only the right of possession of a $20.00 mule. It was the lawyer's only means of advertising himself and he knew that if he talked loud enough, long enough and eloquently enough, he might be employed in more important matters.

Nowadays, of course, we are specializing and I have no doubt that many of you here present seldom engage in jury trials.

The specialist not only makes more and bigger fees, but renders a more highly efficient service to his clients, but while specialization is more remunerative and more efficient, it is not half as much fun as the old-fashioned country law practice where the lawyer undertakes to cover the entire field of the law.

Unfortunately for my pocketbook, I have been a country lawyer all of my life. I have never specialized in anything. My practice has covered the whole field, including the prosecution and defense of criminal cases, the prosecution and defense of personal injury cases, the trial of all sorts of civil suits and of equity suits. The result of this great diversification is that I have learned a little bit about everything, but not very much about anything. Most of my work, however, has been in the trial of litigated cases of one sort or another. The result is that I have had a great deal of experience, but with varying degrees of success, in submitting arguments or summations to the jury.

Since no two cases are exactly alike and since each case presents an entirely different problem to all other cases which a lawyer may have tried, it would be most difficult to lay down any rule to be followed other than the most general outline which may be illustrated by experiences which I have had or observations which I have made of the work of other trial lawyers.

The summation to the jury can be, and very often is, the most important phase of the presentation of your case. The thoughtful advocate will use it, not as an opportunity for spread-eagle oratory, but to explain the evidence, to demonstrate the truth of his client's contentions, to point

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**In July, 1952, the Florida Law Journal promised its readers the text of an address which former Congressman J. Mark Wilcox had delivered the preceding month as a member of an outstanding panel on trial tactics at the 1952 convention. But the panel's remarks were not edited for publication. After Wilcox's death in 1956 at his home in White Springs, the manuscript was located among his personal effects by his former law partner, Circuit Judge William A. Herin of Miami. As a Congressman, Wilcox was noted for his early interest in aviation, civil and military, and was styled "the executor of Billy Mitchell's will." He authored the Wilcox Municipal Bankruptcy Act and the Everglades National Park Act. An outstanding trial lawyer, he was frequently sought after as a bar speaker. He was a member of the firm of Hudson & Cason for many years.

out, if possible, the unreasonableness of his opponent's position, and above all, to assist the jury in arriving at a verdict which will speak the truth and accomplish substantial justice.

If I were to emphasize one single thing as being more important than all others, I think I would say that absolute sincerity and honesty is that primary factor in the summation to the jury.

If you do not believe in the righteousness of your client's position, you should settle the case before it ever comes to trial. No lawyer has any right to say anything to a court or a jury that he does not conscientiously believe in his heart to be true. The trial lawyer's job, first of all, is to assist the jury in arriving at the truth.

And don't be deceived. You can't sell a jury on something that you don't believe in yourself.

I can best illustrate this by an experience I had many years ago when I was counsel for a railroad company in Georgia.

The case started out as a simple test of a law which required the collection of an extra fee from passengers who boarded trains at stations where ticket agents were on duty, but failed to buy a ticket. The plaintiff boarded the train without a ticket; he refused to pay the additional fee required by the law and the train crew stopped the train and put him off. This was all a part of the plaintiff's plan to test the validity of the statute.

As the case progressed, the plaintiff became imbued with the idea of getting a substantial verdict and contended that in putting him off the train, the crew had used unnecessary force and violence.

I had introduced the testimony of the train crew and two passengers who had testified that no violence was used and no injury inflicted upon the plaintiff. I was ready to close my testimony when the claim agent for the railroad company said that he had one more witness who was a disinterested passenger and who would clinch the case for us. I made the mistake of calling the witness without having first interviewed him. He told exactly the same story that the train crew had told. I asked him as to his position in the coach at the time of the ejection of the passenger. When he explained to me where he was sitting in the coach, I knew from my previous inspection of the coach that it was impossible for him to have seen any of the things that he had testified to. I said nothing, of course, and the attorney for the plaintiff, who had not inspected the coach, did not know enough to develop the impossibility of the witnesses' testimony. The case went to the jury which returned a verdict for the plaintiff. I am convinced that I would have won that case had I not put up that last witness, but when he testified to the same story that the other witness had related and when I realized that it was impossible for him to see what he said he saw, I lost faith in the testimony of my other witnesses and my own psychological attitude got over to the jury. They knew that I did not have any faith in my own case and this all comes back to what I said a moment ago, "You can't sell something that you don't believe in yourself."

In approaching the summation, the trial lawyer should bear in mind that the jury is composed of laymen who are not versed in legal verbiage, that in the vast majority of cases they are intelligent people who have no interest in the outcome of the case and are anxious to do the right thing, but are entirely ignorant of the facts of the case. Documents must be explained and their relationship to other evidence pointed out. Every significant fact must be emphasized. The lawyer knows why he introduced certain testimony. His summation is his opportunity for telling the jury what that evidence means.

Remember: The jury doesn't know anything about the case; the jurors' only opportunity for finding out about your side is what you tell them in your summation. Take nothing for granted. Explain everything—if you can.

Second in importance, not only in the summation, but in the whole conduct of the trial, is to bear in mind that the jury is going to decide your client's case. It has always been my notion to present the evidence and make the sort of argument which will appeal to the jury. If a lawyer keeps his mind too much on how the record is going to read, he is apt to lose the verdict. Convince the jury and let the other lawyer worry about the supreme court.

I do not believe that it is ever wise to submit a case to the jury without argument. I had that experience once. I rep-

resented the plaintiff in a civil matter; the defendant had introduced his testimony and I had made a motion for a directed verdict. The court debated the matter at some length, then decided that probably it would be better to let the jury have the case because there might be some word of testimony somewhere in the record that would make a directed verdict error. I said "Very well, we will submit it to the jury without argument."

The jury went out and after deliberating for some four or five hours came back with a verdict for the other side. One of the jurors who happened to be a very good friend of mine said to me afterwards, "I knew that if you believed in your client's case, you would have raised hell for an hour or so; and when you refused to make an argument, I knew you did not have any faith in it and so we found for the other side."

The object of the argument to the jury is to present your side of the case logically, and to stress the reasons why your side should prevail, of course. I think sometimes lawyers make a mistake in thinking that the object of the argument to the jury is two-fold. First, to display his own powers of oratory, and second, to take that opportunity of vilifying the witnesses on the other side. It has been my observation that the average jury is in sympathy with the witnesses. The juryman realizes that the witness is inexperienced. He realizes that the witness, many times, has been brought into court over his own objection. He realizes further that the lawyer is at home and is in his own element in the court room. The jury resents too vigorous cross-examination and particularly resents, what the jury may think to be an unfair attitude toward the witness in the argument. As a matter of cold fact, after forty-two years at the bar, it is my belief that at least 95% of the people who take the witness stand do their dead-level best to tell the truth. They don't always tell the truth. They don't always tell *all* of the truth because of prejudice, or interest, because of their own background or the frailties of their memories. And sometimes they give an entirely mistaken impression as to the facts, but that is not deliberate. Therefore, I think it is most unwise for any lawyer—not only unfair but unwise—for any lawyer to unduly denounce a witness on the other side. Of course, if you have a firm conviction that the witness has lied, I know of no reason why you shouldn't pay it provided you have first satisfied yourself that the other man is not bigger than you are and that you will be able to stand your own in a physical contest. I had an experience of that sort once.

I was defending a man for murder. There was a witness for the state who, I was absolutely convinced, had deliberately lied. I thought I had fairly well demonstrated it in his own cross-examination and in the examination of other witnesses. I needed to clinch it however, because if the jury believed that particular witness, they were going to hang my client. My one hope of acquittal was to convince the jury that this man had lied. He was a great big, double-jointed, rawboned cracker, and was sitting in the front row in the audience. I had unfortunately backed myself up in the corner. I surveyed the distance between the man and myself. I observed that the sheriff who was equally as big as the witness was about half way between the witness and me and I assumed that the sheriff would do his duty to preserve order in the court; and so I backed myself up into this corner and tore into this fellow and finally I said that the facts showed that this man had deliberately lied. The witness got up from his seat on the front row in the court room and said, "You won't come outside and say that."

Well, mistakenly, I took that as a sign of weakness—that he wouldn't jump on me in the court room, but wanted to go outside to do the job—so I said, "My friend, we don't have to go outside. I am free, white and twenty-one and I assume full responsibility for what I have said."

Thereupon, he started toward me. Well sir, it seemed to me like it was a half hour before that sheriff ever got out of his seat. My face was saved because the sheriff did step in between us. I had already glanced over my shoulder to see how much room I had to back up, but as I said, unfortunately, I had gotten myself in a corner and could not retreat.

Sometimes oratory has its place, but also it can be overdone. I recall that many years ago when I was a youngster, I was county solicitor in a little town up in Georgia. They had a bone dry law in

that state long before national prohibition. I was prosecuting a bootlegger. I hope that the fact he was able to pay a substantial fine out of which I could collect my fees did not influence me, but I was convinced that he was guilty. We had introduced the evidence. The defendant had a very shrewd attorney, a very convincing man and he made a most convincing argument to the jury and as I sat there and listened to him, I saw this fellow just gradually easing out of my fingers and I thought I was going to lose my case. In that section we had a great many Hardshell Baptists. They believed in enforcing the law and telling the truth and paying their debts. If you had a good Hardshell Baptist on your jury and you could make out anything like a good case against the defendant, you could count on a conviction. Well, I observed old Brother Hand, a Hardshell Baptist preacher, sitting on the front row and said to myself, "Brother Hand is my one hope to keep this fellow from being acquitted." And so I addressed my remarks to Brother Hand. I laid it on pretty thick and I called on all of my powers of persuasion, I quoted liberally from the Scriptures and used all the oratory I could command. I was laying it right down in Brother Hand's lap. Finally, I paused for breath and old Brother Hand could not stand it any longer. I had oversold him. He came forth with a fervent "Amen."

The court very promptly declared a mistrial.

It often happens that our clients prevail in spite of what his lawyer says rather than because of it. We think we are doing a great job and when the jury returns a verdict in our favor, we think it was because of our own great genius, when, as a matter of fact, the jury based its verdict on something we never even mentioned.

I recently defended a doctor in a malpractice case. The plaintiff claimed that he suffered an injury because of the injection of a spinal anaesthetic. The evidence was of a highly technical nature. I proved that the medicine used was proper, that the amount used was the standard dose, that the needle which the doctor used was the standard size needle, and that the medicine was injected at the right place. I argued this technical evidence at great length and patted myself on the back that I had done a great job not only in presenting the testimony, but in making the argument to the jury. Weeks later, one of the jurors met me on the street and said that the jury had believed the plaintiff's story was utterly ridiculous because in his declaration he had accused the doctor of assault and battery. Plaintiff's counsel had not taken sufficient time to explain why the suit had been brought as for assault and battery.

Another rule that must be followed is the exhibition of absolute confidence and the avoidance of a defeatist attitude. It often happens that testimony of a highly emotional character is introduced by your opponent. Many times we take it for granted that the jury is going to be swept off its feet by these emotional appeals and we make the mistake either of trying to ignore such testimony, or of trying to ridicule it. In most cases, neither approach is successful. We have to face such situations and try to convert them to our own advantage.

As illustrative of what I mean, I cite a personal injury case which I defended many years ago. It involved the death of several children. Over my objections, the garments of one of the children were received in evidence. I realized that in his concluding argument, plaintiff's counsel would exhibit these little garments and would undertake to appeal to the sympathy and emotions of the jury. In presenting my final summation to the jury, I beat the plaintiff's lawyer to the draw by taking these little garments out of the suitcase containing them and spreading them out on the table before the jury. I then made the sort of argument that I though the plaintiff's lawyer had in mind. I tried to picture to the jury the horrors of the situation in which the little girl found herself through no fault of her own. I then pointed out to the jury that the garments could serve no useful purpose in the trial of the case other than to obscure the real issue and cause the jury to render an unfair and unjust verdict because of the sympathy for the child and her parents, and then undertook to explain that the defendant was not responsible for the unfortunate accident which had resulted in the death of the child.

The result was that plaintiff's counsel found himself completely unable to discuss

the little garments or to make any emotional appeal to the jury because it had already been done.

It has been my observation that when the trial lawyer finds himself confronted with that sort of situation, he cannot avoid it and any attempt at ridicule will react against him. There is only one approach, and that is to face the situation and present his side of it to the jury.

It also happens that sometimes we can convert to our own advantage testimony which on its face appears to completely destroy our client's case. A fair example of this is a criminal case which I tried a couple of years ago. I was defending a man charged with income tax evasion. The government had presented a so-called "net worth and expenditures" method of proof. That is to say, the government began by showing that on a certain date the defendant had a net worth of a specified amount. Then by adding to that amount from year to year the sum which the defendant had reported as net income and by deducting from that his known expenditures, the government undertook to show that the defendant over a period of years had spent a sum of money greatly in excess of his reported income. In the course of its case, the government introduced a former employee of the defendant who testified that over a period of approximately twenty years, the defendant had received at least $1,000 a day over and above his reported income.

On the face of the testimony, it would appear that the government had dealt a solar plexus blow to the defendant. I was able to explain, however, that under the net worth theory, the government had, by its own testimony, showed that the defendant had in cash on hand at the beginning of the tax year in question approximately $7,500,000.00. Of course, such a figure was utterly ridiculous. I chose, however, to bind the government by its own testimony rather than to attack the truthfulness of the witnesses' testimony. The testimony, of course, destroyed the government's case, if it was true.

Now this approach could be taken advantage of only in the argument to the jury without a satisfactory explanation to the jury. The testimony would have been used to convict rather than to acquit the defendant.

This case also afforded the opportunity for using another very effective method in presenting an argument to the jury, that is the use of a story to illustrate an important point.

In the course of its figures, the government had shown that the defendant began with a certain sum of money in hand at the beginning of the period in question. It then admitted that he had inherited another fixed amount of money. By adding these two figures together, the government undertook to show the amount held by the defendant at the beginning of the period. Its witness, however, made the mistake of subtracting the inheritance from the amount of cash on hand rather than adding. Here again, I was able to bring out a mistake in the government's figures, which I could not have done except in the argument to the jury. After having pointed out the mistake with appropriate references to the fact that the government's figures could not be relied upon by the jury, I then illustrated the government's case by a story of a storekeeper in the village in which I was reared. This storekeeper extended credit to the cotton farmers in the section. This credit was known as a "run bill," which is to say, that during the course of the year, the merchant sold the farmer all of his necessities and charged them to him on the book. In the fall of the year when the cotton was harvested, the farmer would deliver his cotton to the merchant who would give him credit on the book for the amount of cotton delivered. This merchant, however, followed the custom of charging the first bale of cotton to the farmer instead of giving him credit for it. The result was that the merchant not only stole the farmer's first bale of cotton, but also made him pay for it. If the farmer discovered the error and called his attention to it, the merchant then gave him credit for the bale of cotton but left it still charged with the result that when the account was corrected, the merchant still stole the first bale of cotton, the only difference being that when the account was corrected, the merchant just didn't make the farmer pay for the cotton. I then pointed out that the government's method of bookkeeping not only stole the defendant's inheritance, but also made him pay for it.

My purpose in citing these cases of mine

is two-fold: First, to illustrate the points I have tried to make and second, and most important, to demonstrate what a great trial lawyer I have been. I have attended many "bull sessions" with lawyers. They always begin by one of the lawyers saying "That reminds me of a case I once had," and then follows a story in which the lawyer points out some particularly brilliant move which he made in the course of the trial. Each of the other lawyers then, not to be outdone, tells a story in which he made an even more brilliant demonstration of ability than the preceding lawyer had shown. And thus, the lying continues with each trying to outdo all of the others. The accomplishments of each lawyer grow with each repetition of his story. I am just like all of the balance of you. I never tell of the cases in which, by my own blunders, I have lost my cases. Those I choose to forget and it is only those where I claim to have demonstrated some particularly shrewd strategy that I choose to remember. If from the stories I have told, you have gained the impression that I have been a real "humdinger" of a trial lawyer, I shall not be disappointed, though I may not otherwise have given you anything to think about.

In spite of the occasional injustices which have been done to my clients, I am convinced that the jury system is the greatest system ever devised by civilized mankind for the determination of facts.

In conclusion, let me say that the lawyer's part in the trial of jury cases is one of great responsibility. Having satisfied himself of the correctness of his client's case, his duty to his client requires that he exert every ounce of his energy toward obtaining the verdict. But his duty never required him to do anything other than establish the truth. He has no right to suppress the facts nor to distort them, nor to deceive the court or a jury into believing that which is false.

The practice of law is not a business; it is not a trade. It is more even than a profession; it is a calling—surpassed in its high service to mankind only by the priesthood and the ministry.

No man has the right to enter this noble profession unless he first dedicates himself to the cause of truth and justice. It has often been said that most lawyers work hard, a few live well, but all die poor. The financial rewards are not usually very great, but the conscientious lawyer obtains his greatest compensation from the knowledge that by his efforts he is making a contribution towards the establishment of truth and the accomplishment of justice among men.

Shortly after I was admitted to the Bar, I asked an old judge to tell me what I should do to become a good lawyer. Without a moment's hesitation, the old gentleman said: "To be a good lawyer, you must first of all be a good man."

Over the period of a long and active career, I have observed that, while the shrewd trickster may appear to prosper for a time, the truly great lawyers whom I have known were all men of the highest moral character, who fought vigorously for their clients' rights, but who never for a moment lost sight of their responsibility to their communities, their fellow men and the cause of justice.

When the lawyer begins his career, if his training in law school has been what it should be, the steeple on the courthouse has a halo around it. He should see to it that that halo is never removed. He must never let the courthouse become anything less than the "Temple of Justice." The practice of law must never degenerate into a mere means of making money. The lawyer is worthy of his hire and must collect fees if he is going to support his family, serve his community and continue in the practice of law, but the fee is of secondary importance. His first duty and responsibility in the practice of this high and honorable profession is the establishment of the truth.

Recovery By Wife For Loss Of Consortium Of The Husband

JOHN B. THURMAN*
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IN RECENT months much has been said concerning the right of the wife to recover for the loss of consortium of the husband, when such loss was occasioned by the negligent act of a third person. Various courts have been requested to pass upon the question. Prior to May 29, 1950, it was generally understood among the legal profession, and the insurance companies writing liability insurance, that no such right existed and that no such right could or should exist until it was first authorized by statute, this being due to the well established rule that inasmuch as no such right existed at common law, it could not exist without legislative creation.

On May 29, 1950, the first recovery in this country, without legislative creation, was allowed in the case of *Hitaffer v. Argonne Co., Inc.,* 183 F. 2d 811. In that case the circuit court of appeals merely took it upon itself to find that the reasons previously given in denying recovery were unsound and that in this "enlightened day and age" that these reasons ought not to be followed. Actually, when one reads the decision in the *Hitaffer* case it would at first appear to be rather convincing, but a study of the question will clearly reveal that the major weakness in the opinion is the use by the court of the husband's right of action, rather than a true consideration of the real merits of the cause of action. Literally speaking, the decision of the court in the *Hitaffer* case would seem to say that "judicial empericism" is the answer to the question and that the judiciary should have implied permission, at its election, to transgress the boundary established between the legislative and judicial departments of the government. An illustrative case to the contrary, the boundary between legislative and judicial authority, is *Lucas v. Bishop,* 224 Ark. 353, 273 S.W. 2d 397, wherein the Arkansas Supreme Court refused to establish a new cause of action, stating that "judicial empericism" was not the answer to the problem.

The text writers unanimously agree that the wife, in the absence of statute, has no right to recover for the loss of consortium of the husband. Restatement of Torts, Volume 3, Section 695; 27 Am. Jur. Section 514, page 114; 41 C.J.S. Section 404, page 900.

The English courts, prior to 1950, had consistently held that a wife had no right of recovery for loss of the consortium of her husband and, following the *Hitaffer* case, *supra,* the question was again taken before the English courts where the King's Bench was asked, for the first time, to review the rule of long standing and to follow the *Hitaffer* decision. This was in the case of *Best v. Samuel Fox Company,* 2 K.B. 654, and, in 1951, Lord Justice Birkett delivered the opinion and held that no recovery should be permitted the wife under the facts there existing. This decision can be found in Volume 2 of the 1951 All English Reports, and a reading of the entire opinion is recommended, particularly since some attorneys have construed the opinion to hold that where there was a total loss of consortium that a recovery would be permitted.

In attempting to uphold the right of the wife to recover for the loss of the consortium of the husband, a number of cases have gone before the superior courts wherein it was contended that the married women's statute which gave to the wife the right to contract and be contracted with, sue and be sued, and to be subjected to all laws as though she were a *femme sole,* likewise should permit her to recover for consortium. It was contended that the Emancipation Act removed the common law yoke and that by reason thereof the right of recovery should be permitted. It has, however, generally and consistently been held that no new rights were created by this act, but that it merely removed existing disabilities, and that since the wife had no action for loss of consortium at common law, she acquired none under the revised statute. Illustrative cases on this point are: *Patelshi v. Snyder,* 179 Ill. App. 24; *Bernhardt v. Perry,* 276 Mo. 612, 208 S.W. 462; *Cravens v. Louisville & W. R. Co.,* 195 Ky. 257, 242 S.W. 628; *Nash v.*

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Mobile & O. R. Co., 149 Miss. 823, 116 So. 100; *Sheard v. Oregon Elec. R. Co.*, 137 Ore. 341, 2 P. 2d 916; *Howard v. Verdigris Valley Elec. Coop.*, 201 Okla. 504; *Maloy v. Foster*, 8 N.Y.S. 2d 608, 169 Misc. 964.

The universal rule adopted by the above cases, and many other cases too numerous to mention, is that whatever additional rights may have been extended to women generally under the so-called emancipation statutes, or married women's act, such statutes did not confer a new right upon the wife which would permit recovery for loss of consortium allegedly resulting from negligent injuries of the husband, since no such new cause of action was created by the act itself.

In one case the circuit court of appeals was asked to apply the *Hitaffer* case and permit a recovery in a state whose supreme court had not passed on the question. The Court of Appeals for the Sixth Circuit, was asked to uphold the wife's right to recover for loss of consortium under the Arkansas law in the recent case of *Agnew v. Werthan Bag Corp.*, 202 F. 2d 119. In that case, an accident had occurred near Forest City, Arkansas, which resulted in injuries to the husband. The husband sued for his injuries and his wife likewise sued for loss of consortium with her husband arising out of the same accident. Both actions were tried in the United States District Court for the Western District of Tennessee, and the judge dismissed the wife's action for loss of consortium. In sustaining the motion of the defendant to dismiss the wife's complaint on the ground that it failed to state an actionable claim against the company, the district court expressed the opinion that, under the Arkansas law, a wife is not entitled to recover for the loss of services and consortium of her husband resulting from a negligent injury inflicted upon him. The wife appealed and her main dependence was placed upon the case of *Hitaffer v. Argonne Co., supra,* wherein Judge Clark departed from the common law doctrine and held that a wife has a cause of action for loss of consortium, due to the negligent injury of the husband. In the *Agnew* case, the court of appeals rejected the wife's contention, refused to follow the *Hitaffer* case, and sustained the ruling of the lower court dismissing her cause of action. In its opinion on page 125, the court said:

> "None of these (Arkansas) cases, in our judgment, even intimates that a wife possesses the right to sue for damages for the loss of her husband's consortium resulting from an injury negligently inflicted upon him.
>
> "Being bound as we think we are to look to the common law as declared by the state courts of our country, where the Arkansas courts have not spoken upon the subject, we find the decisions, as heretofore indicated, to be overwhelmingly against the contention of appellant."

Thus, this United States Court of Appeals, in construing the Arkansas law, has expressly found that the wife has no cause of action for the loss of consortium of the husband.

Since the *Hitaffer* case, the matter has again been before the courts of this country and only two of the superior courts of last resort have seen fit to accept the *Hitaffer* case as authority. These two cases are *Brown v. Georgia - Tennessee Coaches, Inc.* 88 Ga. App. 519, 77 S.E. 2d 24, a decision rendered in 1933, and *Acuff v. Schmit*, (Iowa), 78 N.W. 2d 480, a very recent opinion delivered September 18, 1956. A United States district court in Nebraska did hold that in the absence of a controlling decision by the Nebraska court, the *Hitaffer* case would be followed, *but* the decision of this court was, apparently, not appealed from. *Cooney v. Moomaw*, 109 F. Supp. 488. All other federal courts have declined to follow the *Hitaffer* case and the courts of appeals for the sixth and ninth circuits refused to do so in the absence of controlling decisions by the California and Arkansas courts. *Felice v. U. S.*, 217 F. 2d 515; *Agnew v. Worthen Bag Co., supra.* Likewise the *Hitaffer* case was rejected in *O'Neil v. U. S.*, 202 F. 2d 366, and *Seymour v. Union News Co.*, 217 F. 2d 166.

At least three jurisdictions allowed the wife an action for loss of consortium, or at least indicated they might do so, only later to expressly reverse themselves and rejoin the majority. In *Hipp v. E. I. DuPont de Nemours & Co.*, 182 N.C. 9, 108 S.E. 318, North Carolina allowed this right but, four years later, the supreme court of that state in *Hannont v. Tidewater Power Co.*, 189 N.C. 120, 126 S.E. 307, reversed itself and unanimously denied such right of action to the wife. In *Griffin v. Cincinnati*

Realty Co., 27 Ohio Dec. 585, the wife was allowed a recovery for loss of consortium, but two years later the Ohio law was established to the contrary in *Smith v. Nicholas Building Co.*, 93 Ohio St., 101, 112 N.E. 205. In New York, recovery was allowed in *Passallacqua v. Draper*, 199 Misc. 827, 192 N.Y.S. 2d 973, only to be reversed on appeal in *Passallacqua v. Draper*, 279 App. Div. 660, 197 N.Y.S. 2d 812. Thus it will be seen that, even in those states where recovery was once permitted, those courts realized the unsoundness of their decisions and reversed them, rejoining the majority view.

The right of a wife to recover for loss of consortium, has been denied in at least twenty-nine jurisdictions. One such case from each jurisdiction is:

Alabama: Tyler v. Brown Service Funeral Co.. 250 Ala. 295, 34 So. 2d 203.

Arizona: Juene v. Del Webb Const. Co., 269 P. 2d 203 (1954).

Colorado: Johnson v. Winlow, 286 P. 2d 630 (1955).

California: Felice v. U. S., 217 F. 2d 515, (9th Cir.).

Connecticut: Marri v. Stanford St. Ry. Co., 84 Conn. 9, 78 Atl. 582.

Deleware: Sebleuski v. Geman, 2 W.W. Harr. 540, 32 Del. 540, 127 Atl. 49.

Florida: Ripley v. Ewell, 61 So. 2d 420.

Illinois: Pateleski v. Snyder, 179 Ill. App. 24 *Seymour v. Union News Co.*, (7th Cir.) 217 F. 2d 166 (1954).

Kentucky: La Ease v. Cincinnati N. C., 249 S.W. 2d 534 (1953).

Indiana: Boden v. Del Mar Garage, 185 N.E. 860, 205 Ind. 59.

Maryland: Emerson v. Taylor, 194 Atl. 538, 5 A.L.R. 1045. *O'Neil v. U.S.*, 202 F. 2d 366. *Costal Tank Line v. Carole*, (1955) 113 A. 2d 82.

Massachusetts: Geraeny v. Berkson, 223 Mass. 257, 111 N.E. 785. *Fuller v. A. T. & T.*, 21 F. Supp. 741, affirmed 99 F. 2d 620.

Michigan: Harker v. Bushouse, 254 Mich. 187, 236 N.W. 222.

Minnesota: Eschenback v. Benjamin, 263 N.W. 154, 195 Minn. 278.

Mississippi: Nash v. M. Co. R. Ry. Co., 149 Miss. 823, 116 So. 100, 59 A.L.R. 676.

Missouri: Bernhardt v. Perry, 276 Mo. 612, 208 S.W. 463, 12 A.L.R. 1320. *Holder v. Elms Hotel Co.*, 92 S.E. 2d 620, 104 A. L. R. 339.

New Jersey: Tobassen v. Polley, 96 N.J. L. 66, 111 Atl. 153. *Larcca v .American Chair & Cable Co.*, 92 A. 2d 811.

New York: Passallacqua v. Draper, 107 N.Y.S. 2d 812 (1953). *Tennelruso v. Geuryhan*, 115 N.Y.S. 2d 322 (1954). *Loure v. Mannone*, 197 N.Y.S. 2d 182 (1953).

North Carolina: Hennart v. Tidewater Power Co., 189 N.C. 120, 126 S.E., 307.

Ohio: Smith v. Nidrolas Bldg., Co., 93 Ohio St., 101, 112 N.E. 204. *Berts v. Armeo Steel Corp.*, 102 N.E. 2d 444.

Oklohoma: Nelson v. A. M. Lockett Co., 343 P. 2d 719.

Oregon: Sheard v. Oregon Elec. Co., 137 Ore. 341, 2 P. 2d 916.

Pennsylvania: Choniko v. Butch Katz, (1954) 53 Lac. Jr. 180.

South Dakota: Joseviski v. Midland Constructors, 117 F. Supp. 681.

Tennessee: Napier v. Martin, 250 S.W. 2d 35.

Texas: Garrett v. Reno Oil Company, 271 S.W. 2d 764 (1955).

Wisconsin: Nickel v. Hardware Mutual, (1955) 70 N.W. 2d 205.

Washington: Ash v. S. S. Muller, Inc., Wash. 261 P. 2d. *Werthen Bag Corp. v. Agnew*, (6th Cir.) 202 F. 2d 119.

England: Best v. Samuel Fox & Co., 2 K. B. 639.

Since the *Hitaffer* decision in 1950, the common law courts of this country and abroad, have been asked to review the question in the light of that decision. With the sole exception of the Georgia and Iowa courts, the doctrine of the *Hitaffer* case has been unanimously repudiated and the common law rule readhered to and reaffirmed. These cases are as follows:

Arizona: (1954) *Juene v. Del E. Webb Const. Co.*, 77 Ariz. 269, 269 P. 2d 723.

Colorado: Franzen v. Zimmerman, 256 P. 2d 879 (1953).

Florida: Ripley v. Ewell, (1952) 61 So. 2d 420.

Kentucky: La Eace v. Cincinnati Ry., 249 S.W. 2d 534 (1953).

Maryland: Costal Tank v. Carole, 113 A. 2d 82 (1955).

New Jersey: Danek v. Hommer, (1952) 9 N.J. 56, 87 A. 2d 5. *Larocco v. American Chain Co.*, (1952) 23 N.J. Super. 195, 92 A. 2d 811.

New York: Cook v. Snyder, 119 N. Y. 2d 487. *Passallacqua v. Draper*, (1951) 279 App. Div. 660, 107 N.Y.S. 812. *Lourie*

v. Mammone, (1951), 279 App. Div. 660, 107 N. Y. S. 182.

Oklahoma: Nelson v. A. M. Lockett & Co., 206 Okla. 334, 243 P. 2d 719.

Ohio: Wing v. Schleiger, (1955), 273 P. 2d 356.

Pennsylvania: Chomiko v. Butch Katz, 53 Lac. Jr. 180 (1954).

Texas: Garrett v. Reno Oil Co., 271 S.W. 2d 764 (1954).

Wisconsin: Suse v. A. O. Smith Co., 260 Wis. 403, 51 N.W. 24.

Washington: Ash v. S. S. Mullen Co., (1953), 43 Wash. 2d 345, 261 P. 2d 118.

Federal Courts:

Tennessee court applying Arkansas Law: *Werthan Bag Co. v. Agnew,* 202 F. 2d 119, (6th Cir.).

Applying California law: *Felice v. United States,* 217 F. 2d 515, (9th Cir.).

O'Neil v. U. S., 202 F. 2d 366, (Maryland).

Applying *Illinois* Law (1954): *Seymour v. Union News Co.,* 217 F. 2d 166, (7th Cir.).

Josewski v. Midland Const., 117 F. Supp. 681, (South Dakota).

England: Best v. Samuel Fox & Co., 2 K. B. 639.

A review of the above decisions will reflect that the courts of the respective states have advanced many reasons for denying the cause of action to the wife. Principally, the main reasons are:

(1) *Legislative authority is necessary.* Most constitutions reserve to the legislative branch of the government the right to "make the laws", reserving to the judiciary the right to "construe the laws so enacted by the legislature". If the judiciary be permitted to legislate, then the "check valve" between these two branches of the government would be opened, and there would be no further use for the legislative branch of the government.

(2) *Fear of double recovery.* In the eyes of the law, a recovery by the husband from the alleged tortfeasor is supposed to "make him whole" and the wife, therefore, should not again recover for the same injury. This argument is well reasoned by Professor Roscoe Pound in his article, "Interest in Domestic Relations", 14 Mich. Law Review, 177, 193 and 196.

(3) *Finality of final settlements.* The Florida Supreme Court recently denied recovery and rejected the *Hitaffer* decision because of its dislike of upsetting settlements upon which the statute of limitations had not run. In cases too numerous to mention, tortfeasors and their insurance carriers have voluntarily settled cases upon the then existing state laws, without making any attempt to have the wife join in the release. When the supreme court of any state creates a new cause of action and holds that such cause did exist, it upsets what was thought to have been a final settlement. Legislative acts are ordinarily not retroactive, but a decision of a superior court holding that a cause of action did exist would be applicable to all past accidents.

(4) *The wife is owed no services.* The husband's right at common law was based principally upon his inherent right to the services of the wife, whereas, the husband owed no services to the wife. This theory finds support in *Restatement of the Law* and in the Missouri decisions.

(5) *Remoteness of injury.* Many courts expressly held that any injury to the wife is too remote and indirect to allow recovery. If the right should be given to the wife, then why should not some cause of action be created in favor of the children, grand-children and anyone further removed?

More important than an isolated recovery by a wife for the loss of the husband's services, is the question of whether the judiciary, (whether it be called judicial empericism or otherwise), should invade the field reserved to the legislative branch of the government. If the judiciary be permitted to legislate in one field of law, then there could be no valid reason for prohibiting judicial legislation in numerous other fields. It is submitted that the sound rule of law should be that the creation of any new cause of action is a subject that addresses itself to the state's policy forming department, the legislature. Until the legislature has seen fit to designate the redress which it has the right to do, the judiciary should not transgress the boundary established by the respective constitutions. Courts should have nothing to do with the wisdom or expediency of the statutes and, if a law operates harshly, the remedy should be with the legislative branch of the government and not the judiciary.

Workmen's Compensation Act as Exclusive Remedy

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The South Carolina Workmen's Compensation Act contains a provision in substance as follows: If A undertakes to perform work which is a part of his trade or business, and contracts with B to perform the whole or any part of that work, then A shall be liable to pay workmen's compensation benefits to any workman employed by B in the performance of that work to the same extent as if such injured employee had been employed by A. The Workmen's Compensation Act also provides that it is the exclusive remedy of an employee against an employer for injuries where the parties are subject thereto.

Unless the compensation law with which you are concerned contains a similar provision to that summarized above, you can turn to another article in the Journal, because the present article will have no interest to you.

Davison-Paxon Company operates several department stores in the Southeast, one of which is located at Columbia, South Carolina. The stores, and that in Columbia in particular, are of the usual department store type, selling men's and ladies' ready-to-wear, shoes, millinery, etc. It was not the custom of Davison to operate the millinery department itself, but this was contracted to some millinery concern, in this instance Emporium World Millinery Company.

An employee of Emporium, while engaged in the business of such concern within the Davison store, sustained a fall on the basement stairs and proceeded with a common law negligence action against Davison. On a trial of the action the plaintiff recovered approximately $24,000 by way of a jury verdict, needless to say over strenuous objections of the defendant, the principal objection of which, except for the lack of negligence aspect, was that the exclusive remedy of the plaintiff was under the above provisions of the Workmen's Compensation Act.

There was a written agreement between Davison and Emporium whereby the former granted the latter use of space in the Davison store to conduct the millinery department, the space was not designated in the lease and the actual space to be occupied by Emporium was subject to verbal allocation by way of agreement between the store manager and Emporium. Under the agreement Emporium was to receive the benefit of lights, power, display cases, elevator service, etc., and was to carry first class merchandise, subject to criticism and recommendation by Davison for improvements in the stock of merchandise. Davison was to receive payment by means of a percentage of the net sales. Davison's cashier was to receive all payments for millinery and Davison was to bill all charge accounts and accept any losses on unpaid charge items. Davison was to pay Emporium's employees but was to be reimbursed. Emporium was to use no name other than Davison in connection with the millinery department, the millinery items were not to carry Emporium's label but that of Davison. The agreement was rather lengthy but the foregoing are the salient features thereof.

The general nature of the millinery department operation was, as far as the general public was concerned, merely another department in this department type store and ostensibly was operated by Davison.

On appeal from the judgment the South Carolina Supreme Court reversed the case and held that the exclusive remedy of the plaintiff was under the Workmen's Compensation Act. *Mrs. Frances Adams v. Davison-Paxon Company,* .....S.C....., 96 S.E. 2d 566, opinion filed February 13, 1957.

The South Carolina Supreme Court said: "There was evidence, and it may be said to be within common knowledge, that millinery is an essential and integral part of a woman's ready-to-wear store.

"If respondent's construction of the facts were followed to logical end, appellant might operate all of its many departments in the same manner as it does its millinery department, and it would not be in the department store business at all, which seems to us a *reductio ad absurdum.*

"The purpose of the statute is to extend the benefits of workmen's compensation to workmen who otherwise would not

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be entitled to them. It is a protection of the employees of irresponsible contractors who do not provide workmen's compensation coverage for their employees, and prevents employers from escaping liability by doing through independent contractors what they would otherwise do through their own employees."

The state of Massachusetts has reached a contrary, though distinguishable, decision on a rather substantially similar state of facts. There the injured employee was engaged by a concessionaire which operated a luncheonette and soda fountain in the department store of the defendant. *Stratis v. McLellan Stores Company,* 311 Mass. 525, 42 N.E. 2d 282. The Massachusetts court apparently reached its conclusion on the basis that a luncheonette and soda fountain was not strictly a part of the business, trade and occupation of the department store, particularly as the statute there provided: "This section shall not apply to any contract of an independent or subcontractor which is *merely ancillary* and *incidental* to and is no part of or process in the trade or business carried on by the insured owner." (Emphasis added).

Levy's Ladies Toggery, Inc. v. Bryant (Tenn., 1946), 192 S.W. 2d 833, involved litigation under the Unemployment Compensation Statute. The particular statute provided in substance that where an employing unit contracts with another for any of the work which is a part of the employing unit's usual trade, business or occupation, the employing unit shall be deemed the employer for purposes of the tax statute. One Hiller operated a boys' ready-to-wear shop on the third floor of Levy's Department Store. The Tennessee court held that the relationship of Levy and Hiller fell within the statute and that Levy was the employing unit thereunder. This is quite parallel to the matter under discussion. The court commented upon the above mentioned *Stratis* case and stated that had the *Stratis* case arisen under Tennessee, the opposite result would have been reached.

To the same effect is *Union Dry Goods Co. v. Cook,* (Ga., 1944), 32 S.E. 2d 190, where a large department store operated a shoe department and beauty shop through another under a written agreement. See also *J. Goldsmith & Sons Co. v. Hake,* (Tenn., 1948), 213 S.W. 2d 15, and *Unemployment Compensation Commission v. L. Harvey & Son Co.,* 227 N.C. 291, 42 S.E. 2d 86.

The state of Alabama has come to the same conclusion as announced in the *Adams* case as it will appear by reference to *J. E. Ross & Co. v. Collins,* (Ala., 1932), 140 So. 764, which involved the lease of a coal mine upon a royalty basis. See also *DeBardeleben Coal Corp. v. Richards,* (Ala., 1948), 37 So. 2d 121. The United States Court of Appeals for the Louisiana District reached a similar conclusion on the basis of a similar Louisiana statute in the cast of *Isthmian S. C. Co. of Del v. Olivieri,* 5 C.C.A. 1953, 202 F. 2d 492. There the injured workman was an employee of a service which had contracted to guard the employer's outgoing and incoming cargo. In reaching the conclusion that the employee of the Police Servicing Company was in fact an employee of the steamship company for purposes of workmen's compensation, the court said: "The decisive factors are the nature of the employee's work and of the principal's trade, business or occupation."

Professor Larson in his work on workmen's compensation distinguishes the *Stratis* case from the general trend of authority by the language that the department store in the *Stratis* case "merely rented space to a concessionaire," and for that reason the statutory relationship of employee and employer did not exist.

There are varied and sundry decisions on closely allied points, but the particular factor to consider in any situation is the particular wording of the statute involved.

By way of information, the *Adams* case contains verbatim the agreement between the department store and the millinery department, which may be of some benefit to practitioners who desire to use language in similar instruments so as to avoid liability of the department store or other similar employer under the principles of Workmen's Compensation Acts where another party is engaged to do and perform a part of the trade, business and occupation of A.

The Miller Act—Sub-Contractor's Materialman—Sufficiency of Notice—Remedy Where Notice Insufficient

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I. Notice

The purpose of this monograph is to briefly review some of the cases dealing with the issue which is raised under the Miller Act, (Title 40 U.S.C. 270 (b)) when a supplier of material to a subcontractor fails to give notice to the prime-contractor, or gives notice of questionable sufficiency, and the remedy available in such event to the materialman against the subcontractor's surety.

To facilitate analysis and comment, the terms "owner," "prime-contractor," "sub-contractor," and "materialman" (generally meaning herein the subcontractor's materialman) will be used as standard phraseology replacing proper names or other terms used in quoted opinions of courts.

The Miller Act requires persons contracting with the United States (i. e., prime-contractors) for the construction of public works to supply payment and performance bonds. That portion of the act under scrutiny here is sub-section (a) of 40 U.S.C. 270 (b) and, for the purpose of this review, italics are used to indicate the salient provisions involved herein.

> "Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, *That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days* from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, *stating with substantial accuracy the amount claimed* and the *name of the party to whom the material was furnished* or supplied or for whom the labor was done or performed. *Such notice shall be served by* mailing the same by *registered mail,* postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, *or in any manner in which the United States marshall of the district* in which the public improvement is situated *is authorized by law to serve summons.*"

Obviously, the notice provision has no application to a sub-contractor's materialman who has a contract, express or implied, with the prime-contractor. Such a materialman can sue the prime-contractor and his surety regardless of notice. In this review, we are concerned first with what will meet the requirement of notice, and second, with the materialman's right of recovery by direct action against the subcontractor's surety where the materialman has given no notice to the prime.

Although there has been a tendency to regard actions by materialmen under the Miller Act (then the Heard Act) in a more liberal light than might be the case under a private contractor's bond (see e.g. *Illinois Surety Co. v. John A. Davis Co.,* 37 S. Ct. 614, (1916)), the rule requiring strict compliance with the notice requirement as a jurisdictional pre-requisite to an action against the prime-contractor was voiced in *U. S. For Use and Benefit of John A. Denie's Sons v. Bass,* 111 F. 2d 965 (6 Cir., 1940), with the language "This section is without ambiguity and requires

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notice as a jurisdictional pre-requisite to an action for the use and benefit of the sub-contractor against the principal contractor and his surety." In this case there was no notice at all.

U. S. For Use of Kewaunee Mfg. Co. v. U. S. Guaranty Co., 37 F. Supp. 561, (1939), was an action by the materialman of a sub-contractor against the prime-contractor where there had been no compliance with the statutory formula for notice. The plaintiff claimed an exception since *the sub-contractor had "instructed" the prime-contractor to withhold payments sufficient to pay the creditors,* which instructions had been "accepted" by the prime. The court, in ruling that this was no exception said: "The language of the Act shows its purpose was to benefit the materialmen and at the same time protect the contractor by requiring notice of the nature of the claim. Under the plaintiff's theory the way would be open to every materialman to sue the contractor based on a claim that the contractor had agreed with the sub-contractor to pay all the sub-contractor's bills out of the income from the contract," and, further, "this section is without ambiguity and requires notice as a jurisdictional pre-requisite to an action for the use and benefit of a sub-contractor against a principal contractor and its surety. . . The contract 'express or implied' must be such a one as flows from the relations directly between the materialman and the contractor." (prime-contractor).

The district court for the district of New York in *U. S. For Use and Benefit of Hallenbeck v. Fleisher Engineering Co.*, 30 F. Supp. 964, (1939), stated that the Miller Act is remedial and must be construed liberally, and held that notice directed to the project engineer *by ordinary mail* (but with copy served upon the prime) was sufficient compliance with the statute. The Court of Appeals for the Second Circuit affirmed, (107 F. 2d 925). The supreme court granted certiorari to resolve the apparent conflict and Mr. Justice Hughes, in holding that the notification by ordinary mail within the required time, actually received was sufficient notice within the meaning of the statute said, (311 U. S. 15, 61 S. Ct. 81, 85 L. Ed. 12):

> "In giving the Statute a reasonable construction in order to effect its remedial purpose, we think that a distinction should be drawn between the provision explicitly stating the condition precedent to the right to sue and the provision as to the manner of serving notice. The structure of the Statute indicated the distinction. The proviso, which defines the condition precedent to suit, states that the materialman or laborer 'shall have a right of action upon the said contractor' within 90 days from the date of final performance. The condition as thus expressed was fully met. Then the Statute goes on to provide for the mode of giving notice. 'Such notice shall be served by mailing the same by registered mail, postage prepaid,' or 'in any manner' in which the United States Marshal 'is authorized by law to serve summons.' We think that the purpose of this provision as to the manner of service was to assure receipt of the notice, not to make the described method mandatory so as to deny the right of suit when the required notice within the specified time had actually been given and received. In the case of such receipt, the reason for a particular mode of service fails. It is not reasonable to suppose that Congress intended to insist upon an idle form. Rather, we think that Congress intended to provide a method which would afford sufficient proof of service when receipt of required written notice was not shown."

See also *U. S. For Use of Welch Co. v. Fleisher Eng. Co.*, 30 F. Supp. 961, holding that service upon one of two joint prime-contractors is sufficient.

As mentioned above, the sub-contractor's materialman need not be bothered about notice if he has a contractual relationship with the prime-contractor. *U. S. For the Use of Foley v. United States Fidelity and Guaranty Co.*, 113 F. 2d 888 (2 Cir., 1940), (and citing the *Fleisher* case, *supra,*), was a case in which the sub-contractor refused to do certain work contending that it was not covered by his contract. The prime-contractor took over this work and performed it himself. In the course of taking over and doing this work, the prime-contractor gave a guaranty to the sub's materialman that materials furnished would be paid for. The court said, "The question remains whether the bond furnished by (sub) to (prime) protects against liability to the materialman, or merely provides indemnity against loss sustained by payment of such liability . . . we agree . . . that the mere existence of liability (of the prime) to (sub's materialman) would not suffice (to

render sub and his surety liable on the bond) for the bond appears by its terms to provide only for indemnity against loss". At this point in the trial the prime had not yet paid the materialman. However, after the trial and the rendition of the court's decision, the prime paid $8500.00 in satisfaction of a judgment obtained by the materialman in an action brought upon the prime's guaranty. On a subsequent motion to amend judgment, so as to provide that the previous dismissal of the prime's counter-claim and third party complaint against sub's surety should be without prejudice to institution of further suit against the sub's surety by the prime, the court held that this payment by the prime of the judgment, constituted a "loss" against which the sub's bond afforded indemnity. The court said, "although there is no express provision in the contract between (the sub) and (the prime) that (the sub) will pay for the materials used by him in the work, such a promise is undoubtedly to be implied from his agreement to 'furnish and supply all materials' and the bond provides that (the sub) 'shall faithfully perform the contract . . . free and clear of all liens arising out of claims for labor and materials . . . and indemnify and save harmless the obligee from all loss, cost or damage which it may suffer by the reason of the failure to do so' ". The court ended up by holding that since there was a contractual relationship between the prime and the sub's materialman the latter did not need to prove the usual notice under the Miller Act, and the court further held that inasmuch as the sub's bond indemnified the prime against "loss" the prime could collect upon the bond after (but only after) paying the materialman.

In *U. S. For the Use of Birmingham Slag Co. v. Perry,* 115 F. 2d 724, (1940), the prime-contractor's contract was with the Farm Security Administration. The materialman wrote by ordinary mail, not to the prime, but to the Farm Security Administrator, (the owner), stating the amount owing by the sub-contractor. The administrator in turn then wrote, again by ordinary mail, to the prime-contractor and enclosed a copy of the letter sent him by the materialman. Holding that the *Fleisher* case, *supra,* was controlling, the court held that notice within the meaning of the statute had been served.

In *U. S. For Use of American Radiator Company v. Northwestern Engineering Co.,* 122 F. 2d 600, (1941), the eighth circuit said that written notice of claim must still be given, and that invoices given to the sub-contractor who in turn gave them to the prime-contractor to be used to establish progress payments were not such written notice of claim as required by the statute; accordingly the verbal assertion by the prime-contractor to the plaintiff, materialman, that he owed the sub-contractor nothing, and that there was accordingly no liability to the plaintiff, "or any other declaration that might have been made," could not constitute an effectual waiver of the necessity of giving written notice within the meaning of the statute. The court said:

> "While the Statute uses the general term notice its other language clearly shows that it is intended to be in legal effect the presentation of a claim. That presentation is required to be made in written form stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed."

In *Coffee et al., v. U. S. For Use of Gordon,* 157 F. 2d 968, (1946), (5 Cir.), the materialman showed the bill for sand to the prime-contractor; they talked about it, and the prime-contractor might, if he wanted, have taken manual possession of it. The court, citing the *Birmingham Slag* case and the *Fleisher* case, *supra,* held that notice within the meaning of the statute had been served. The holding is reflected in the syllabus as follows:

> "Where a materialman, having no contractual relation to the contractor, exhibited to the contractor as notice of his claim for sand furnished a sub-contractor, a writing showing the amount claimed and the identity of the sub-contractor, and where the contractor examined and discussed and might have taken the writing, written notice of the claim was sufficiently served, as required by the Miller Act, to sustain action on the public construction bond for use of materialmen, particularly since under federal rules the marshal may serve summons as a state sheriff would and under the Statute of Florida, where the work was done and notice given, summons may be served by reading it to the person to be served."

The issue in *United States For Use of Bruce Co. v. Fraser Construction Co.*, 87 F. Supp. 1, (D. C. Ark., 1949), arose in the trial court on motion to dismiss the complaint for failure to allege written notice. The court found that the complaint alleged, *inter alia,* that sub's materialman notified the prime that sub was not paying for the material and, after being so notified, the prime requested plaintiff to continue furnishing materials, and told plaintiff that the materials would be paid for, and that the prime's bond (herein sued upon) was for plaintiff's protection; and that, subsequently, the prime took over the sub's performance and used materials on hand which had been furnished by plaintiff and, later, the prime received additional materials from plaintiff which were incorporated into the job. The court held that, assuming that the plaintiff materialman could prove these facts, a contractual relationship express or implied would exist, thereby dispensing with the necessity of written notice, and requiring that the motion to dismiss the complaint be overruled.

In *Houston Fire & Casualty Company v. U.S. For Use of Trane,* 217 F. 2d 727, (5 Cir., 1954), the court said that the writing need not be signed by the supplier but that the requirement of notice is supplied if, as here, *the materialman gives an oral notice* to the prime contractor, and the prime contractor "makes a written acknowledgement of request in full recognition of the sub-contractor's indebtedness, and the fact that it had not been, but must be, paid". The facts disclosed by the footnotes were that within the 90 day period the materialman went to the prime and in conversation disclosed the invoices and the amount of indebtedness, whereupon the prime as requested by the materialman, on the same day wrote a letter which boils down to no more than the following: "This will confirm our conversation concerning (the sub's) contract with us, and the fact that we have not paid them. This delay is due to (our) negotiations with the (U.S.) Engineers, but payment should be forthcoming within a few days. We appreciate your patience." From this case it would seem that the notice requirement is complied with if the prime's written acknowledgement merely indicates that the prime is satisfied with whatever information has been orally conveyed.

II. Suit Against Sub-Contractor And His Surety

The second phase of our inquiry deals with the situation where the sub-contractor's materialman has failed in respect to notice and has no contractual relationship express or implied with the prime-contractor. Under such circumstances the materialman plainly has no cause of action against the prime-contractor and his surety. The question then arises does the materialman have an action against the sub-contractor's surety under the bond which the sub-contractor furnished to the prime-contractor even though the time has expired for giving the Miller Act notice? Was this bond given solely for the protection of the prime-contractor? Or was it "intended to benefit" third party materialmen? Or if it contains the words "to pay all materialmen" are these words a direct promise to materialmen so as to eliminate necessity for notice to the prime-contractor? Suppose the bond is a performance bond intsead of a payment bond, or suppose it is couched solely in terms of indemnity?

At this point, we may divide the cases according to whether the action is brought against a payment bond, or a performance bond or an indemnity bond. The latter is a type which has increased in use in more recent years, obviously to meet the trend of the decisions expanding liability on payment bonds. Where no payment bond, but only a performance bond had been given by the sub-contractor to the prime-contractor, the interesting collateral question has arisen whether it protects the prime-contractor against the sub-contractor's materialman.

With respect to action under a payment bond, Professor Corbin (4 Corbin on Contracts, Sec. 798 to 804) gives the answer which has had increasing acceptance by the courts and now represents the weight of authority:

> ". . . the third party has an enforceable right if the surety promises in the bond, either in express words or by reasonable implications, to pay either in express words or by reasonable implication, to pay money to him. If there is such a promissory expression as this, there need be no discussion of 'intention to benefit.' We need not speculate for whose benefit the contract was made or consider whether the surety was buy-

ing the promise for his own selfish interest or for philanthropic purposes. It is a much simpler question: 'Did the surety promise to pay money to the plaintiff?' "

A few of the jurisdictions take the view that because the sub-contractor's materialman has an adequate remedy under the Miller Act by giving notice to the prime-contractor that, therefore, the sole purpose of a sub-contractor's payment bond is to indemnify the prime-contractor and, therefore, that the language in the sub-contractor's payment bond "to pay for all materials and labor" is not intended to give an additional remedy to the materialman.

This view is represented in *McGrath v. American Surety Company,* 112 N.E. 2d 906, 307 Ct. of App. 552, (N. Y., 1954). In this case the sub-contractor had given separate payment and performance bonds in the usual terms to the prime-contractor. The court squarely held that the sub-contractor's materialman under the Miller Act had no cause of action against any bond except that of the prime-contractor, saying that the purpose of the sub-contractor's bond was to indemnify the general contractor and not to enlarge the rights of the sub-contractor's materialman which were adequately protected by the Miller Act, ". . . notwithstanding the sub-contractor's bond was conditioned upon payment by sub-contractor of its obligation to laborers and materialmen."

However, *Socony-Vacuum Oil Company v. Continental Casualty Company,* 219 F.2d 645, (2 Cir., 1955), espouses the opposite of the doctrine laid down in the *McGrath* case. In the *Socony* case the sub-contractor's bond was a combination payment and performance bond but the court said that this was a difference without significance and "we do not blink the fact that the McGrath case . . . is legally indistinguishable . . . but both the Spokane and the McGrath cases and others of similar purport we think out of line with the great weight of authority referred to above." The court rejected the viewpoint that because the materialman had an adequate remedy under the Miller Act against the prime-contractor that, therefore, the sub-contractor's bond should be construed only as indemnifying the prime-contractor. The court said:

"If the obligee (the prime contractor) sought indemnity only, or if it wished to exclude third parties from benefit under the surety bond, the natural presumption is that it would not have required a surety's payment-bond. But here the prime contractor required a payment bond and paid the premium for a payment bond, at least indirectly under the terms of the sub-contractor whereby the sub-contractor made the direct payment. And the defendant (the sub-contractor's surety) in return for a premium, furnished the payment bond. It follows that the surety should not be allowed to avoid the obligation which it was paid to assume by suggesting that as things turned out the obligee did not need all the protection which was bargained and paid for. Were we to hold otherwise, we should in effect by substituting *a mere contract of indemnity* for the bond which was made, be presenting the defendant's surety company with an "unearned windfall." (italics ours)

The historical background of the development of the general law concerning the right of materialmen to sue on contractor's bonds is to be found in lengthy annotations in 77 A.L.R. 21 and 118 A.L.R. 57, and an annotation in 70 A.L.R. 318 dealing with the right of a sub-contractor's materialman to sue upon the prime-contractor's bond given in connection with a public improvement.

On the question whether a sub-contractor's performance bond protects the prime against a materialman's claim (the sub-contractor not having posted a payment bond) the case of *Houston Fire & Casualty Insurance Company v. Cloer,* 217 F.2d 906, (5 Cir., 1954) although not strictly relevant to this monograph is interesting, in that it was a suit by a sub-contractor's materialman against the prime-contractor and his surety, with the latter two seeking judgment over against the surety on the sub-contractor's performance bond, there having been no payment bond furnished by the sub-contractor. The sub-contractor had defaulted after incorporating materials in the job and the sub-contractor's surety had taken over the job and completed it. The condition of the sub-contractor's bond was simple—namely, "to faithfully perform said contract." The provision of the underlying sub-contract was also simple. It was, "The sub-contractor agrees to furnish all materials and perform all work as described." Although not mentioned in the

opinion, there evidently was no question but what the sub-contractor's materialman had given the required notice under the Miller Act because suit had been filed directly against the prime-contractor and his surety who were seeking judgment over against the sub-contractor's performance bond. The issue was whether, under these circumstances, a performance bond would supply the function ordinarily expected from a payment bond. The court said:

> "As we read the contract in the light of the circumstances under which it was executed, we conclude that it required not only that Latimer (sub-contractor) furnish the materials, but also that it furnish them free of any claims of materialmen; or in that all materials furnished be paid for by the sub-contractor. All parties to the sub-contract and its surety bond were charged with knowledge that Cloer had been required to give surety to the United States Government that he would pay all labor and material costs in full in connection with the principle contract."

The court cited *Foley v. USFG,* 113 F. 2d 888, (2 Cir.) and *Seaboard Surety v. Standard Accident Ins. Co.,* (1938-a Heard Act case), 277 N. Y. 429, 14 N. E. 2d 778, 117 A. L. R. 658, which support the proposition that a sub-contractor's performance bond also indemnifies the prime-contractor against materialmen's claims. This is the subject of an annotation at 117 A. L. R. 662 where some authority to the contrary is noted. This case, however, makes it plain that a surety writing only a performance bond for a sub-contractor will generally find itself furnishing an indemnity-type payment bond free of charge, unless a higher premium is charged for a performance bond unaccompanied by a payment bond.

We now approach the situation where the sub-contractor's bond goes no further than to *indemnify* the prime-contractor. This was the situation in *Frommeyer v. L. & R. Construction Co., Inc.,* 139 F. Supp. 579, (U. S. D. C. N. J., 1956) a Miller Act case. The sub-contractor gave only one bond conditioned "that if the principal shall faithfully perform the contract on his part, free and clear of all liens arising out of claims for labor and materials entering into the construction, and indemnify and save harmless the owner (sic,-apparently should be 'prime-contractor', instead of 'owner') from all loss, cost or damage which he may suffer by reason of the failure to do so, then this obligation shall be void . . ." The sub-contractor's unpaid materialman filed suit against the sub-contractor and his surety joining as defendants the prime and his surety. The sub-contractor's surety moved to dismiss the complaint as to it on the ground that regardless of the liability of the sub-contractor it cannot be sued on the bond by any other than the prime-contractor. Strangely enough, nothing is said in the opinion as to whether the materialman gave notice to the prime under the Miller Act so as to render the prime subject to suit by an unpaid materialman of the sub-contractor. If such notice had been given, then we might have a situation similar to that in the *Cloer* case, *supra,* where the sub's materialman sought judgment against the prime and his surety and they in turn asked for judgment over against the sub and his surety. Whatever obscurity results from this circumstance does not prevent a clear announcement by the court of the distinction between language in the bond constituting a plain promise to pay materialmen as distinguished from language merely indemnifying the prime against loss or damage from the claims of the sub's materialmen. In the opinion, the court points to Restatement of Security, Sections 165 and 166, wherein the distinction is again made between a direct promise by the sub-contractor to pay his materialmen and a mere promise to indemnify the prime against having to pay the sub's materialmen. Even Professor Corbin is quoted as approving the distinction, to-wit:

> ". . .the legal duties of the surety ought not to be expanded beyond the terms of the surety's promise. . . Did the surety promise to pay money to the plaintiff? . . . If, on a reasonable interpretation the surety bond contains no promise to pay laborers and materialmen of course they have no right against the surety." 4 Corbin on Contracts, Sec. 800, page 175.

The court then points out that the case arises in New Jersey and is controlled by New Jersey law, and that New Jersey belongs to that class of jurisdictions placing the greatest limitations upon a materialman's right of action. But the court

goes on to say that not even under the most liberal rule can the plaintiff prevail, saying:

"Thus, among New Jersey and the three jurisdictions surrounding her can be found the gamut of judicial views concerning the interpretation of this type of contractor's surety bond. They are (1) the New Jersey view of strict construction of a surety's undertaking —a construction so strict that it ignores language which the majority of courts would find to be words of express promise by the surety to pay the plaintiff; (2) the New York search for an 'intention to benefit' to be gleaned from the words of the bond and the circumstances surrounding its origin; and (3) the rule followed in Pennsylvania and Delaware which simply looks for a promise to pay third parties within the four corners of the bond and any instruments incorporated in or guaranteed by it, which was also the rule adopted by the Second Circuit in dealing with a bond controlled by Vermont law." (Socony-Vacuum Oil Co. v. Continental Casualty Co., supra.) "Obviously this plaintiff cannot sue (sub-contractor's surety) under the strict construction rule followed by the cited New Jersey cases. Nor could it maintain this suit under the New York rule because here, as in the McGrath case, the presence of rights under the Miller Act would foreclose the finding that the parties to the bond at the time of its execution intended to benefit unpaid laborers and materialmen. And, it is equally clear that plaintiff cannot sue under the Pennsylvania cases, which it presses, because of the absence in (the sub-contractor's surety's) bond or in the underlying contract, of a promise to pay plaintiff for the default of (the sub-contractor). The motion to dismiss the complaint as to the American Surety Company (sub-contractor's surety) must be granted."

It is worthy of note that in the *Seaboard* case, *supra*, the court, in holding that a sub-contractor's performance bond also operated as a bond to indemnify the prime-contractor against unpaid materialmen of the sub, the court said:

"A different situation exists where the person in whose favor the bond runs is under no obligation to pay the materialmen and they cannot obtain a lien on his property. That was the case in Schwartz and Co. v. Aimwell Co., 227 N. Y. 184, 124 N. E. 892, where this court said 'it has not paid any of them and it is not personally liable for their payment. As indicated, no mechanics liens have been filed nor are any threatened. Under such circumstances, the plaintiff could not voluntarily pay such claims and then recover the amount paid from the principal or surety on the bond'. To enable it to do that. . . there must 'be involved somewhere as an essential element of its right to recover damages which have been or may be suffered by it by reason of the failure to pay these debts, . . .'. In the case at bar that element is present. The plaintiff was under legal obligation to pay these materialmen."

The court further said:

"In the case at bar, if a suit had been brought directly by or on behalf of the unpaid materialmen, it is doubtful whether the bond issued by the defendant would entitle the materialmen to recover."

The recognition in the *Cloer* case of the principle that a sub-contractor's *performance* bond is an indemnity-type *payment* bond *running exclusively to the prime-contractor* is consistent with the doctrine laid down in the class of cases represented by *Fosmire v. National Surety Company*, 229 N. Y. 44, 127 N. E. 472, holding that a materialman may not maintain suit on performance bond or a single payment-performance bond "because the primary or dominant purpose of the combined bond is regarded as 'performance' which should not be dissipated or defeated by the neglect of the sub-contractor to meet his obligations."

The New York Court of Appeals made it clear in *Daniel-Morris Co. v. Glensfalls Indemnity Co.*, 308 N. Y. 464, 126 N. E. 2d 750, (1955), (not a Miller Act case) that where a sub-contractor gives a performance bond and a separate payment bond, an unpaid materialman of the sub-contractor can sue directly on the payment bond, because the prime-contractor's rights under the performance bond are not thereby dissipated or reduced.

Macatee v. Hamilton, 38 S. W. 530, (Civ. App., Texas, 1896), is an old case in which the contractor covenanted that he would pay all claims of indebtedness incurred in

the construction "and hold the (owner) blameless and indemnify it against all demands and liens which might be filed or asserted. . ." The bond contained the following stipulation:

" And we agree to pay said (owner) or any other person advancing at (the owner's) request money used in the construction of said improvements, the full amount of all sums of money so advanced for the payment of labor performed or material used in the construction."

Further along in the bond it was stated:

". . . this bond being given for the use and benefit of any person who may advance money used in the construction of said improvements, or pay for labor employed thereon or material used therein, as well as for the benefit of said (owner) and any or either of them are hereby authorized to sue on this obligation."

The owner was the Pythian Hall Association and the building was a lodge hall. The plaintiff had furnished materials to the contractor. The court said:

"There are two beneficiaries referred to in (the contractor's) bond, or rather one beneficiary and a class of beneficiaries, namely, the (owner) and any persons advancing money to (the contractor) at the request of the (owner), to be used in the construction of the Pythian Hall; and as appellant does not allege that he advanced money to (the contractor) he does not fall within the class of beneficiaries above mentioned, and he cannot sue upon the bond . . . "

In another elderly case, *Pine Bluff Lodge of Elks v. Sanders*, 111 S.W. (Ark.) 255, (1908), the court held that subcontractors' materialmen could not claim any interest in the proceeds of the prime-contractor's surety bond given to the owner where the provision of that bond was that the prime-contractor "shall well and truly indemnify and save harmless the said obligee (owner) from any pecuniary loss resulting from the breach of any of the terms, covenants and conditions of the said contract on the part of the said principal to be performed, . . . " The court said:

"The bond in the present case was not given to secure the payment of material furnished to the contractor to be used in the construction of the building, but was given to indemnify and save harmless appellant (owner) from any breach of the contract on the part of the principal contractor. It was in no wise intended to benefit or to protect the materialmen, and no right of action thereon exists in their favor."

Skinner Bros. Manufacturing Co. v. Shevlin, 248 N.Y. Supp. 380, (App. Div., 1931), is another case holding that *indemnity* given to the owner against materialmen's claims does not give the materialman a right to sue upon the bond. In this case the transit corporation (for convenience called "owner") engaged Shevlin Engineering Co. (contractor) to install a heating system. The plaintiff (materialman) furnished materials to the contractor. The contract provided that the contractor would hold the owner harmless from all liens claims and demands and that the owner would not be obligated to make payments to contractor if there was unpaid the claim of any materialmen of the contractor of which the owner had notice, and that in such event the owner would be entitled to withhold enough money to pay such a materialman's claim unless contractor delivered to owner a bond indemnifying owner against any such materialman's claim. The court said:

"Judgment should have been given for the defendants, since the complaint fails to state that any promise was made by (the owner) to pay the plaintiff. . . without the existence of such a promise, no recovery may be had by the third party (materialman). In the case at bar, the plaintiff does not set forth any ultimate facts showing the existence of any promise on behalf of the alleged promisor, but merely sets forth provisions which, at most, were made by the Transit Corporation (owner) exclusively for its own benefit and which would give it a right to withhold moneys due the (contractor) unless a bond was given to the (owner) for its protection. The fact that the (owner) could make the payments, if a bond was given to it by the (contractor), is an additional confirmation that the (contractor) did not make or intend to make a promise to pay the claim of the plaintiff's subcontractor. The lack of allegation by the plaintiff of ultimate facts showing the existence of a promise on behalf of the (owner) is not aided by certain conclusory allega-

tions, such as that 'it was the duty . . . of the (owner) to withhold from moneys due. . . an amount sufficient to pay. . . plaintiff.' The agreement was not made for the benefit of the plaintiff. It was, on the contrary, made solely for the benefit of the defendant Transit Corporation (owner) the obligee named therein. The bond was conditioned for two things: first that (contractor) would pay any judgment. . . (for) a mechanics lien, and second that (the contractor) would hold the (owner) harmless in relation to any money that might be due the plaintiff (materialman) from the (contractor) and from any expense incurred in litigation in connection therewith. Turk v. Ridge, 41 N. Y. 201."

SUMMARY

I.

The statutory notice is dispensed with wherever a "direct contractual relationship" arises between the prime and the materialman, as, for example, where the prime "takes over" the sub's job and ratifies orders for materials.

Notice by ordinary mail is sufficient. Even oral notice appears sufficient provided the prime makes written acknowledgment thereof. However, a denial of liability by the prime will not serve as a waiver of notice. Notice to one of two joint primes is enough.

Transmission must generally be direct from the materialman to the prime, e.g., "Instructions", from the sub to the prime, to take care of material bills does not supply notice, but written notice by the sub's materialman to the *owner* or to the latter's Project Engineer is sufficient *provided* the owner transmitted it to the prime. The notice must be in the form of a claim; thus delivery of invoices by the sub to the prime to establish progress payments, does not serve as notice from the materialman. Constructive delivery of the notice was recognized where the materialman displayed the bill to the prime and the latter might have taken possession if he desired.

II.

When the notice has failed, the materialman obviously has no suit against the prime and the prime's surety. Whether he has a cause of action against the sub and sub's surety depends upon the jurisdiction and the nature of the bond.

Where the bond given by the sub to the prime is one purely of indemnity, the sub's surety is not liable, inasmuch as the notice which would have rendered the prime-contractor liable, has failed.

If, however, the sub's bond contains "words of express promise" to pay materialmen, then the apparent weight of authority is for the so-called "Pennsylvania Rule", which gives an unqualified right of recovery by the materialman against the sub-contractor's surety. Less broad is the so-called "New York Rule", which is not content with mere words of promise, but looks for the "intention to benefit" to be gleaned both from the words of the bond and the circumstances surrounding its origin. The third category is a so-called "New Jersey Rule", of strict construction, holding that the words of express promise were nevertheless intended as indemnity, for the reason that the sub-contractor's materialman has an adequate remedy under the Miller Act by giving notice to the prime, and therefore the sole purpose of a sub-contractor's payment bond was to indemnify the prime, and that the additional words of express promise were not intended to give an additional remedy.

Where a sub posts only a performance bond, it has been held to operate as an indemnity bond to the prime against claims of the sub's materialmen, but in such situation, it is pre-requisite that the prime has sustained some liability to the sub's materialman, such as through the filing of a mechanics lien or otherwise. However, without direct liability of the prime to the sub-contractor's materialman derived through notice under the Miller Act or via mechanics lien or otherwise, the interpretation of the sub-contractor's performance bond as purely an indemnity undertaking to the prime will result in no liability on the part of the sub's surety. No cases examined hold a sub's surety liable on a pure indemnity to the prime in the absence of liability of the prime to the sub's materialman.

Home Office or Corporation Counsel

P. L. THORNBURY*
Columbus, Ohio

Your editor has suggested that our membership may be interested in "what goes" with an Office of General Counsel of an integrated insurance group such as the Nation-wide group of insurance companies. Perhaps as good a way to get at the matter is to answer the what, who, and why of an Office of General Counsel.

What is an Office of General Counsel? In our case it is a law office specializing in the practice of corporation, insurance and taxation law. It operates in about the same manner as a private law office specializing in those fields of law. Like most present day corporations, we have been analyzed by business consultants. Our organizational manual provides as follows with respect to the objective, responsibility and scope of the Office of General Counsel:

I. OBJECTIVE

To plan, direct, and coordinate the administration of the companies' legal activities; to furnish legal counsel on corporate matters as required; to render legal opinions to the board of directors, the president, other officers, and department heads as required; to interpret all laws and governmental regulations relating to insurance companies; to initiate recommendations with respect to legislation favorable and/or unfavorable to the companies' activities.

II. RESPONSIBLE TO: President

Responsible for:

1. Counsel
2. Associate Counsel
3. Assistant Counsel
4. General Attorneys
5. Attorneys

III. SCOPE

1. *Coordination and Administration.* The vice president-general counsel coordinates the administration of all legal activities of the companies (except those growing out of claims) and reviews the legal phases of the companies' policies, procedures, and practices to assure conformity with established insurance laws and regulations.
2. *Counsel and Opinions.* He is responsible for furnishing legal counsel on corporate matters as required, and for rendering legal opinions to the board of directors, the president, other officers, and department heads as requested.
3. *Interpretation and Recommendations.* He is also responsible for interpreting all laws relating to insurance companies, for observing insurance legislative trends, for making recommendations with respect to legislation favorable and/or unfavorable to the companies' activities, and for conferring with government authorities having relations with the companies.
4. *Review.* He is further responsible for reviewing and determining the adequacy of opinions and and memoranda prepared by staff members.
5. *Research.* Finally, he is responsible for research and study of legal problems affecting the insurance industry.

IV. DUTIES AND RESPONSIBILITIES:

A. *Interpreting and Forecasting Trends In:*

1. *Legislation*—Federal and State
   a. Status of Private Insurance Companies
   b. Policyholder Coverage
   c. Regulatory Requirements
   d. Taxation
2. *Administrative Rulings and Orders*—Federal and State—Affecting:
   a. Company Operating Practices and Methods
   b. Contracts and Coverages
   c. Taxation
3. *Significant Court Decisions* Affecting:
   a. Policyholder Coverage Needs

*Vice President and General Counsel Nationwide Insurance Companies.

b. Industry Practices
c. Company Operations

4. *Legal Opinions* Concerning:
   a. Interpretations of Statutes and Judicial Decisions and Governmental Regulations.
   b. Current Company Practices in the Light of Changing Laws and Regulatory Requirements.

It serves the Nationwide group of insurance companies and including their investments in the fields of broadcasting, housing and finance. In the field of insurance law our services cover all of the matters usually incidental to the business of life, casualty and fire insurance companies, including corporate, rating and agency problems; rules and regulations of the various states in which the companies are qualified to do business relating to the business of insurance, qualification of the companies to do business in new states and the many other legal problems that arise in connection with a group of iusurance companies.

Our services in connection with investments of the companies in recent years have increased greatly due to private placements, changes in investment statutes permitting a wider range of investments and the great growth in assets of the companies during the last decade and the many problems that beset a business organization in these complex times, which range all the way from trying to satisfy a claimant, policyholder or shareholder to participating with local counsel in the trial of cases in which the company is a party.

Who is the Office of General Counsel? In our case it is composed of nine lawyers of different kinds or types of practice and experience in insurance, corporate and tax law and in special fields of law, such as work in connection with the Securities and Exchange Commission and Federal Communications Commission growing out of investments in the housing and broadcasting fields. We prefer a variety of education and experience rather than all of our men coming from a particular law school or experience background. We try to have the type and kind of personnel that the usual corporate law office desires in its practice. We employ the best talent available and pay generally about the same salaries that first-grade law offices pay in private practice. It is our policy to supplement our services by retaining private law firms on all local matters and as consultants on special matters.

Why an Office of General Counsel? You may ask why use an Office of General Counsel instead of using private firms for home office legal work. This, of course, is a matter of policy for the company to decide and in our case we handle our operating legal problems in the Office of General Counsel on the premise that it can be performed on the spot, so to speak, and without delay and with knowledge of the background gained from close association with the business practices of the company. As a matter of practical fact, it would be practically impossible to handle the run of mine day-to-day legal problems in the operation of a group of insurance companies unless the officers and department heads had their lawyer close at hand. If outside counsel were used, it would virtually mean that outside counsel would have to maintain offices in the home office and from a practical standpoint you may as well have an Office of General Counsel within the home office. This does not mean that the companies do not make frequent use of outside or associate counsel. As a matter of fact, the fees of outside counsel come pretty close to approximating the budget of the Office of General Counsel and even though the work performed on the outside constitutes only a relatively small percentage of the total legal work that must be performed.

As indicated above, it is the policy of our Office of General Counsel to retain local counsel in local matters and this is especially true with respect to all litigation. We think that we have excellent public relations with our associate counsel as on trial matters we leave all matters to them for decision except those matters which relate to general company policy. We retain jurisdiction over general company policies due to the fact that we should be in a better position to advise on these questions than outside counsel who are not thoroughly familiar with the history and background of policies adopted by our boards of directors. We try to retain the best counsel available in any given case and once having selected him we rely on him and his judgment. We try to make him a part of our company insofar as the particular case is concerned and furnish him with all of the informa-

tion and advice at our disposal so that he can weigh and determine matters involved in the litigation other than general company policies. I suppose the writer feels so strongly on this subject as he was not alway accorded such consideration by insurance companies represented by his office when he was in private practice. Some companies did accord him such consideration and his recollection is that those clients got his super effort even though he tried to treat all clients alike in the performance of his services in their behalf.

Having selected the best local counsel available, we believe it is good psychology to give him full leeway in trial matters so that he accepts the obligation of making decisions and does not have the home office counsel to blame for any shortcomings that may have occurred in the preparation and trial of the case. If we failed to select the right trial counsel then that is our fault. It is also the policy of our office to remain with counsel selected until he eliminates himself as our counsel through failure to properly perform his work rather than changing counsel on the basis of whoever happens to be riding the crest of the wave locally for the moment. It has been our experience that association with local counsel is one of long duration as well as pleasant and profitable.

We also believe that an Office of General Counsel is in a better position to practice preventive law on behalf of the corporation than outside counsel. Ordinarily one of our attorneys attends planning meetings relating to various proposed projects and quite often can advise with respect to legal problems that may arise along the way and in many instances such obstacles are eliminated before the project gets under way.

Corporation or home office counsel has the responsibility of assisting the president and board of directors in deciding matters of policy. Such counsel is in a much better position to weigh matters of policy than outside counsel primarily due to the fact that he is more familiar with the history and background of the corporation; has the benefit of the thinking and discussions on matters of policy with the president, the executive committee or board of directors; can devote his entire time to a particular client at the time required rather than divide his time among all of his clients as in the case of the private practitioner; and is in a position to know all of the facts when considering matters of policy and legal problems.

In this day of intense competition many legal problems must be answered upon the question being raised in order to meet or beat your competition. Timeliness of your answer may determine whether your agent makes the sale instead of his competitor. Many times the question must be answered during a phone conversation with one of the many company offices located in your operating territory. This can best be done by home office counsel who is fully familiar with the operating practices, procedures and policies of the company.

You will note in our organizational manual that the Office of General Counsel coordinates the administration of all legal activities of the company except those growing out of claims. Our casualty company, of course, has a large amount of claims running in the neighborhood of 90,000 a month and this, of course, is a source of considerable litigation. In decentralizing our operations we also decentralized claim litigation, that is, each region or branch office is responsible for the handling of all claim litigation in its region. At the present time there are about 42 company employed attorneys in the claim departments of the regional offices. The Office of General Counsel is consulted with reference to claims occasionally especially where company policy may be involved and if a claim is being made directly against the company other than growing out of the policy contract, then the matter is referred to the Office of General Counsel for handling.

The regional claims attorney organizes, directs and supervises the claims legal division of the regional claims department, including administrative supervision of all personnel assigned to the division. He provides professional advice and counsel to the regional claims manager and his staff on all claims and related matters. He personally supervises all declaratory judgment actions growing out of policy contracts to which the company is a party. It is his duty to promote favorable relations with members of the bar within his region and we encourage him to take an active part in local bar associations. He selects and

employs local trial counsel within the region in conformity with established company policy. He supervises the maintenance of all suit records required by statute, regulation or established company procedure. He is responsible for the authorization and approval for payment of outside counsel fees. He assigns litigation to and supervises and controls litigation in the hands of trial counsel. In this manner claim litigation is handled as a local matter and in the area where the case will be tried. The claims attorney can keep in close contact with trial counsel and is readily available to him for conferences when needed.

An Office of General Counsel can be of much service not only to its insurance company but to outside counsel representing the company. The relationship between home office or corporation counsel and retained counsel must necessarily be a close working relationship. We would suggest that retained counsel become fully familiar with the manner in which the office retaining him operates so that the proper working relationship can be maintained. It will help avoid misunderstandings as to areas of decision and responsibility on matters referred to retained counsel for handling.

The Erosion of Cullings v. Goetz*

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In *DeClara v. Barber Steamship Lines,*[1] a stevedore employed by an independent contracting firm was killed by a falling door on a pier owned by the defendant, a dock company, and leased to another defendant, a steamship company. Under the lease, the landlord had agreed to make repairs on written notice from the tenant. It had also reserved the right to inspect the premises at any time and to make such repairs as appeared to it to be necessary. The landlord had a superintendent and twenty workmen on the pier at all times. The evidence indicated the door which fell had been in defective condition for some time.

The trial court held for the plaintiff. The second department reversed on the law and dismissed the complaint. The court of appeals reversed on this point and remitted to the appellate division for reconsideration of claimed excessive damages. Judge Fuld, writing for the majority, said:[2]

> "A landlord who had the right to come and go upon the leased premises as he pleases for the purpose of inspection and repair and who is at liberty to correct any defect as soon as it is found, must be regarded as having thereby reserved a privilege of ownership, sufficient to give rise to liability in tort."

Three judges concurred with Judge Fuld. Judge VanVoorhis concurred in the result in a separate opinion in which, oddly enough, Judge Conway, who had also concurred with Judge Fuld, concurred. Judge Desmond dissented with opinion.

While the court in the *DeClara* case expressly reaffirmed its previous decision in *Cullings v. Goetz,*[3] its latest judicial pronouncement on this subject raises a question as to the extent to which recent decisions of the court of appeals have narrowed the principles laid down in the *Cullings* decision. In that case, the plaintiff, a guest of the tenant, was injured by the fall of a defective garage door. The monthly lease between the parties was oral, but the jury found that one of its provisions required the landlord to make necessary repairs. The court of appeals affirmed a dismissal of the complaint, pointing out that a landlord's liability in tort to a tenant or to a person on the premises in his right was incident to occupation and control, which were said to imply the power and right to admit persons to the pre-

*Reprinted, by permission, from the Syracuse Law Review, Vol. 8, No. 1.

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[1]DeClara v. Barber Steamship Lines, 309 N. Y. 620, 132 N.E.2d 871 (1956).

[2]*Supra* note 1 at 630, 132 N.E.2d at 876 (1956).

[3]Cullings v. Goetz, 256 N. Y. 287, 176 N.E. 397 (1931).

mises and to exclude them therefrom. According to the *Cullings* case, occupation and control were not reserved through a covenant to repair.

Cullings was decided in 1931. Commencing with *Scudero v. Campbell,*[4] in 1942, a line of authority was developed by the court of appeals,[5] and echoed in the lower courts,[6] which held that repairs by a landlord, both before and after an accident were admissable as bearing on control and, when admitted, raised a question of fact sufficient to countenance a verdict against the landlord based upon control.

The writer had previously questioned the validity of the *Cullings* doctrine in the light of these repair cases.[7] Decisions since the writing of that article, culminating for the moment in the *DeClara* case, seem to have cast further doubt on the principle of control laid down in *Cullings v. Goetz.*

For example, in *Hawk v. State,*[8] a guest of a tenant of a veterans' emergency housing project slipped and fell when leaving the apartment by a defective private way. The project in question had been built by the state and leased to the City of Binghampton, the lease requiring the city to keep the property in repair and to make no alterations or improvements without the consent of the state. Other provisions of the lease arrangement gave the state budgetary control over the project. Under these circumstances the court of claims found that the state had control of the operation and maintenance of the housing project and it was held liable. The appellate division unanimously affirmed and was, in turn, affirmed by the court of appeals.

Eliminating the fiscal aspects of the state's management of the housing project in question, which would appear not to bear on the basic tort issue, it is difficult to see where the *Hawk* case differs in any material respect from the *Cullings* case. If anything, it is weaker from the standpoint of landlord's liability, because the primary obligation to keep the property in repair in the *Hawk* case was on the tenant. Certainly the *DeClara* case is not difficult to understand with *Hawk* as a precedent.

What, then, has become of the principle, enunciated in the *Cullings* case, that a landlord's liability in tort to a tenant or a person on the premises in his right was an incident of occupation and control? More particularly, what has become of the proposition that occupation and control implied the power and right to admit persons to the premises and exclude them therefrom?

Repairs following an accident are said to evidence occupation and control. An obligation to make repairs, occasioned by the presence of the landlord or his representatives on the premises for purposes of repair, is held to be evidence of occupation or control. In this light, can it be said that anything more than lip service is being paid to a definition of occupation and control which includes the right to admit persons to the premises and exclude them therefrom?

Perhaps, after all, the result of these cases is that the mere presence of a covenant to repair or a right to enter and inspect are not enough. Conceivably, to support liability, something more is required. However, these cases make it clear that, whatever that "something more" may be, it is a good deal less than a right to admit and exclude persons to and from the premises. To that extent *Cullings v. Goetz* would seem to have been eroded.

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[4]Scudero v. Campbell, 288 N. Y. 328, 43 N.E.2d 66 (1942).

[5]*Supra* note 4; Antonsen v. Bay Ridge Savings Bank, 292 N. Y. 143, 54 N.E.2d 338 (1944); Noble v. Marx, 298 N. Y. 106, 81 N.E.2d 40 (1948).

[6]Citron v. Kapner, 271 App. Div. 932, 67 N.Y.S.2d 401 (2d Dep't 1947); Rosenberg v. Kings County Savings Bank, 270 App. Div. 904, 61 N.Y.S.2d 394 (2d Dep't 1946); Dallek v. Stempel, 55 N.Y.S.2d 105 (N. Y. City Ct. 1945); Reische v. Montgomery, 273 App. Div. 824, 76 N.Y.S.2d 273 (2d Dept. 1948); Boreyko v. Bay Ridge Savings Bank, 274 App. Div. 1060, 85 N.Y.S.2d 337 (2d Dep't 1949).

[7]Murphy, *Repairs by a Landlord and Control of Leased Premises.* 1 Syracuse L. Rev. 80 (1949).

[8]Hawk v. State of New York, 307 N. Y. 788, 121 N.E.2d 620 (1954).

The Ontario Unsatisfied Judgment Fund

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In 1930 the Ontario Highway Traffic Act had certain financial responsibility provisions added to it, which had as a primary purpose the indemnification of persons suffering loss or damage through either bodily injury or property damage arising from motor vehicle accidents.

The enactment of this legislation required the suspension of the driving privileges of every judgment debtor against whom a judgment for damages occasioned by a motor vehicle has been awarded, until the judgment is settled and proof of financial responsibility is filed. In the twenty-seven years that this legislation has been in existence it has undoubtedly assisted many innocent victims of traffic accidents to obtain some redress for the damages they received.

After fifteen years experience it was evident from the records that the victims of the negligent and irresponsible driver required further assistance in the collection of damages. Although in many instances the suspension or threat of suspension, of driving privileges resulted in judgments being settled, there were many cases where it had not had such effect. Some judgments had not been paid although a suspension had been in effect for many years.

In 1947, Ontario enacted unsatisfied judgment fund legislation to provide relief for persons who, having suffered damage which was occasioned by a motor vehicle, are unable to recover compensation therefor. The inability to recover may be by reason of the fact that the judgment debtor who caused the damage is unable to pay the judgment obtained against him or because the identity of the vehicle which caused the damage cannot be established.

The fund is maintained by fees paid up on the issue or renewal of driver's licenses. The fund is not an insurance fund: it is a last resort—available when all other sources of payment have failed following final judgment.

The fund is not available to insurance companies and an applicant for payment out of the fund must show "that the application is not made by or on behalf of an insurer in respect of any amount paid or payable by the insurer by reason of the existence of a policy of automobile insurance within the meaning of the Insurance Act." The fund is available to all persons resident in Ontario and to all persons resident in jurisdictions other than Ontario in which recourse of a substantially similar character to that provided by Ontario is afforded to residents of Ontario.

The fund is administered by the Minister of Highways and the officials of his office. The legal work is done by a special branch of the Attorney General's department.

The fund legislation may be considered under two headings:

1. "Normal actions" i.e., actions where the defendant's identity is known, and
2. "Hit and run accidents" in which it has been impossible to identify the person who would normally be the defendant or which are commonly called "Registrar actions".

In the normal actions the plaintiff issues his writ and proceeds to judgment in accordance with the rules of procedure governing all negligence actions. After (if) he obtains judgment and complies with certain requirements, he applies to the court for an order directing payment out of the fund. The fund limits are the $5,000.00-$10,000.00 and $1,000.00 minimum limits in respect of injury or death or of property damage.

In registrar actions, there being no known defendant, it is necessary to obtain leave (from the court) to bring an action against the "Registrar of Motor Vehicles" before the writ may be issued. Upon the application for leave to sue the registrar, in addition to establishing that the damages were occasioned by a motor vehicle, four different matters must be established to the satisfaction of the judge. It must be shown that the applicant would have a cause of action against the owner or driver of the motor vehicle in respect of death or personal injury occasioned by the motor vehicle. The judge must be satisfied that all reasonable efforts have been made to ascertain the identity of the motor vehicle and of the owner and driver

thereof. As to the nature of the material to be placed before the court, it is for the judge, not the deponent to decide whether "all reasonable efforts have been made". Thus the material must provide a statement of the efforts which have been made. It must further be shown that the identity of the motor vehicle and the owner and driver thereof cannot be established. The construction of the clause being conjunctive, the inability to identify all three must be proven. Lastly, the court must be satisfied that the action is not sought to be brought for the benefit of an insurer under a policy of automobile insurance. Once leave to sue has been obtained the plaintiff issues his writ and proceeds to trial. Upon judgment being obtained the amount is paid out of the "Fund" without further application to the court. The same $5,000.00-$10,000.00 limits apply but actions against the registrar are in respect of the death of or personal injury to a person, no amount is recoverable for property damage.

In the "normal action" a judgment creditor is not entitled to payment out of the fund unless he has commenced action against all persons against whom he might reasonably be considered as having a course of action in respect of the damages claimed, i.e., driver, owner, employer, driver and owner of any other vehicles that might reasonably be considered to have been involved or be a contributing cause to the accident, etc.

Default judgment is ineffective for collection out of the fund unless the Minister of Highways is notified of the default and has consented to the proceeding to default judgment. He may enter the action on behalf of and in the name of the defaulting defendant. Thus default by the defendant at any stage of the proceedings requires notice to the minister and an opportunity for him to enter the action.

The minister now may consent to judgment in such amounts as might be deemed proper in actions where he intervenes on behalf of the defendants who default in their defense. Whereas in the early days of the legislation all such suits had to proceed to trial and had three undesirable results; (1) it forced even the most reasonable plaintiff to go to trial, (2) it permitted no saving of court costs, and (3) added to the congestion of the courts.

In 1954 the Highways Department in their annual report considered that the fund, then in its seventh year of operation, undoubtedly justified its existence.

During the first eighteen months the fund was in existence the payments amounted to only $3,601.07. During the next year the payments were $251,843.21. In the next year payments were more than double this amount and every year since there has been a substantial increase so that for the year ending March 31st, 1954, the total payments amounted to $1,611,-023.73. The number of judgments paid increased from four during the first eighteen months to five hundred and ten in the year ending March 31st, 1954. Even with payments of more than a million and a half dollars in the March 31st, 1954, fiscal period representing an increase of thirty-two per cent over the previous year the balance in the fund as of April 1st, 1954, was nevertheless $746,510.86, and it was not felt by the department that any difficulty would be experienced during the next year in meeting all demands for payments even though these be larger than any previous year. This optimism was justified as in the next fiscal period while $1,808,314.43 was disbursed there was a balance left of $911,140.27. That the creation of the Unsatisfied Judgment Fund has not nullified the beneficial effects which the original financial responsibility legislation had in securing the settlement of judgments, is demonstrated by the revelation from the departmental records that in the 1953-54 fiscal period over five hundred unsatisfied judgments which were referred to the department were settled without recourse to the fund being necessary. If to this figure is added the more than five hundred judgments which were paid out of the fund, the department estimates that close to fifteen hundred persons received some direct assistance in having their claims for damages paid. No doubt many more indirectly benefited by this legislation.

Above it was mentioned that where satisfactory arrangements were made for the payment of a judgment in installments the driving privileges of a judgment debtor were reinstated. In this connection it should be stated that the act provides that where a judgment debtor secures a court order for payment of a judgment in installments, the driving privileges of such judgment debtor shall not be suspended so long as there is no default in the payment of installments. This, however, applies to judgments which have not been paid from the fund. Where

a judgment is paid out of the fund the act provides that the judgment debtor may not own or operate a motor vehicle under any circumstances until the total amount paid from the fund has been repaid together with interest at four per cent and until proof of financial responsibility has been filed. In 1955, the Highway Traffic Act was amended to permit the Lieutenant-Governor in Council to make regulations providing for the restoration of the drivers' licenses and owners' permits of persons indebted to the fund who are making repayment to the fund in installments; such regulations when made prescribe the classes of cases to which they are applied and provide the manner of determining the amount of the installment payments, the time and place of payment, and the terms and conditions, including proof of financial responsibility for the restoration of the licenses and permits with a further provision that upon default of ten days duration occurring in the making of any such payment, all drivers' licenses and owners' permits held by the person in default shall be deemed to be suspended.

Aside from being kept under close surveillance by the police, a debtor to the fund is forced, by every means which appear feasible, to make any payments which departmental investigation indicates he should be capable of doing.

In one case reported by the department an amount of almost $5,000.00 was paid in settlement of a judgment recovered against a judgment debtor residing in a border city. Subsequent investigation indicated that the debtor was employed in an adjacent state of the United States and that on occasion he operated a motor vehicle registered in that state across the border into Ontario. The Provincial Police were alerted and were successful in apprehending the debtor while driving in Ontario. He was subsequently convicted of driving while under suspension. The sheriff was notified of the conviction and he had the vehicle placed under seizure. As a result of this action the debtor raised the money required to pay off the judgment in full, plus interest, to secure the release of his car.

The departmental report of March 31st, 1955, stresses the beneficent effect of the Unsatisfied Judgment Fund legislation and states that few people are aware of the far reaching benefits attained by the extra dollar included in the price of the driver's license, that an act, which provides annually almost two million dollars of at least partial easing of the financial strain for victims of automobile accidents, cannot be regarded as anything but good legislation.

From April 1st, 1954, to March 31st, 1955, payments out of the fund totalled $1,808,-314.43. Of this amount, $156,520.94 was paid in settlement of forty-four judgments secured against the Registrar of Motor Vehicles for damages arising out of the "hit and run" accidents. The balance of $1,651,793.49 was paid out in settlement of 599 judgments recovered against the drivers and owners of motor vehicles who were unable to meet their obligations and pay the judgments which had been recovered against them. It is doubtful if any of the victims of these accidents would have received any compensation for the injuries and damages sustained had not the fund been in existence.

The 1955 report of the department went on to say that the fund was in a good position financially and that there were no serious administrative difficulties encountered.

Since compiling the above, there has come forward the suggestion that the Highway Traffic Act may be amended to require uninsured drivers to pay an additional $5.00 fee for their annual driver's licenses which money would form part of the Unsatisfied Judgment Fund.

This paper and statement of payments into and out of the fund would not have been possible were it not for the assistance of the Registrar of Motor Vehicles of the Province of Ontario who readily made available reports and statistics from his files.

Nonresident Motorist Statutes and Notice Requirements Under Standard Policies: Insurers' Liability for Default Judgments*

COMPENSATION of automobile accident victims has in all states been fostered by nonresident motorist statutes.[1] These statutes designate an official, usually the secretary of state,[2] as the out-of-state driver's agent for service of process;[3] they permit an injured party to institute suit in his local court[4] by serving the agent with the summons and complaint.[5] After the agent or the injured has forwarded the summons and complaint to the driver by mail,[6] the local court has jurisdiction over the out-of-state driver;[7] if the driver does not appear to defend, he will be bound by a default judgment.[8] The injured can thus attain jurisdiction more quickly, and at less cost, than if he had to proceed in the driver's home state.[9] But the fact that a

*Reprinted, by permission, from The Yale Law Journal, issue of November, 1956.

[1]See 27 Chi-Kent L. Rev. 230, 231 (1949). See also statutes collected in Culp, *Process in Actions Against Non-Resident Motorists*, 32 Mich. L. Rev. 325 (1934). For general discussion of constitutional and other questions arising under these statutes see Culp, *Recent Develoments in Actions Against Non-Resident Motorists*, 37 Mich. L. Rev. 58 (1938); Scott, *Jurisdiction over Non-Resident Motorists*, 39 Harv. L. Rev. 563 (1926).

[2]Culp, *Process in Actions Against Non-Resident Motorists*, 32 Mich. L. Rev. 325 n.54 (1934).

[3]Hess v. Pawloski, 274 U.S. 352 (1927) (out-of-state driver is deemed to have appointed the state official). The courts have generally abandoned the original rationale of the statues: the fiction that the driver, by using the state's highways, consents to the appointment of an agent. Modern courts have reasoned that the right to appoint an agent for the driver derives from the police power. See Martins v. Fishbach Trucking Co., 183 F.2d 53 (1st Cir. 1950); Hirsch v. Warren, 253 Ky. 62, 68 S.W.2d 767 (1934); State *ex rel.* Rush v. Circuit Ct., 209 Wis. 246, 248, 244 N.W. 766, 767 (1932).

[4]Scott, *Jurisdiction over Non-Resident Motorists*, 39 Harv. L. Rev. 563 (1926) (discussing basis for local court's jurisdiction).

[5]*E.g.*, Ky. Rev. Stat. § 188.030 (1953); Mo. Rev. Stat. § 506, 240 (1949); N.J. Stat. Ann. § 39:7-3 (Supp. 1955). See also statutes collected in Culp, *Recent Developments in Actions Against Non-Resident Motorists*, 37 Mich. L. Rev. 58 (1938) (noting minor variations in other states).

[6]*E.g.*, Ky. Rev. Stat. § 188.030 (1953) (injured must furnish drivers' address to official, who forwards process to driver); N.J. Stat. Ann. § 39:7-3 (Supp. 1955) (official forwards process to driver; no statutory provision as to responsibility for obtaining address); N. Y. Vehicle & Traffic Law § 52 (injured must forward to driver notice of service of process).

[7]Hirsch v. Warren, 253 Ky. 62, 68 S.W.2d 767 (1934) (court's jurisdiction is constitutional, even though the driver did not actually receive notice). The local court obtains jurisdiction, however, only when the statute is reasonably calculated to give the driver actual notice; the statute may, for example, require the injured to furnish the driver's last known address and impose on either the local official or the injured the duty to communicate with the driver by mail or other means. Wuchter v. Pizzutti, 276 U.S. 13, 20 (1928).

[8]Cherry v. Hefferman, 132 Fla. 386, 182 So. 427 (1938); Schaaf v. Brown, 304 Ky. 466, 200 S.W.2d 909 (1947); State *ex rel.* Charette v. District Ct., 107 Mont. 489, 86 P.2d 750 (1939); *cf* Morris v. Argo-Collier Truck Line, 39 F. Supp. 602 (W.D. Ky. 1941).

The constitutionality of a default judgment when the driver has not actually received notice was settled in the leading case of Hess v. Pawloski, 274 U.S. 352 (1927). The Court held that actual receipt was immaterial as long as the statute establishes procedures reasonably designed to give actual notice and the procedures have been followed in good faith. State constitutions have been similarly interpreted. See Culp, *Process in Actions Against Non-Residents*, 32 Mich. L. Rev. 325, 336 (1934).

[9]Hess v. Pawloski, 274 U.S. 352 (1927). Apart from the obvious time and expense that ensues from compelling plaintiff and his witnesses to appear in another state, a special difficulty faces the executor or administrator of an injured party's estate: he may be unable to sue in a foreign state. Mansfield v. McFarland, 202 Pa. 173, 51 Atl. 763 (1902); Joy's Ex'r v. Swanton Sav. Bank & Trust Co., 111 Vt. 106, 10 A.2d 216 (1940). In order to bring suit in a foreign state, the executor or administrator often has to appoint an ancillary representative in the foreign jurisdiction. Atkinson, Wills § 106 (1953). But see 3 Beale, Conflict of Laws § 507.2 (1935) (discussing legislative inroads in more than half the states). Rose, *Foreign Enforcement of Actions for Wrongful Death*, 33 Mich. L. Rev. 545 (1935) (discussing the greater ease of bringing suit in these cases).

valid claim is brought to judgment against the driver does not of itself guarantee compensation of valid claims; usually the injured party's judgment can be satisfied only by the driver's insurer.[10]

Two recent cases indicate that collection of default judgments is hindered by a conflict between the notice provisions of the statutes and the notice provisions of automobile insurance policies. Both *Staples v. Southern Fire & Casualty Co.*[11] and *Tennant v. Farm Bureau Mutual Automobile Insurance Co.*[12] were suits by an injured against a driver's insurer to collect a default judgment obtained against the driver after statutory service of process. Neither insurance company had received notice of an earlier default proceeding,[13] since nonresident motorist statutes provide only for mailing the summons and complaint to the driver,[14] and, as frequently happens, [15] the driver had not received them. In *Staples* the secretary of state had mailed the summons and complaint to the driver's last known address, but the letter had been refused and returned;[16] in *Tennant* the driver's wife had accepted the letter but apparently failed to give it to him.[17] In each case the defendant insurer's contract with the driver contained the widely used standard condition requiring the driver to forward immediately "every demand, notice, summons or other process received by him or his representative."[18] In each case the company's argument was premised on the fact that process had been received by the driver's representative, since service of process had been sufficient to give jurisdiction over the driver. The companies then insisted that, by failing to forward the summons and complaint to the insurer, the driver had breached a condition precedent to the company's liability for the default judgment.[19]

The *Tennant* court denied recovery because lack of notice of the earlier suit had prejudiced the company. Insurance companies require timely notice of the commencement of a suit in order to negotiate settlements, litigate genuine issues of liability and damage, and defend against fraudulent claims.[20] In view of the importance of timely notice, the court reasoned that the driver's failure to notify the company necessarily prejudiced it and was therefore a breach which could not be excused. The court consequently held that, under the terms of a standard policy, the company is not liable unless it receives notice of the suit.

The *Staples* court, too, based its decision solely on interpretation of the policy's no-

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[10]Compensation of automobile accident victims has depended upon insurance in about 59% of temporary disability cases, 75% of permanent disability cases, and 71% of fatality cases. Committee to study Compensation for Automobile Accidents, Report to the Columbia University Council for Research in the Social Sciences 76-91 (1932); Illinois Legislative Council, Publication 115, Financial Responsibility in Motor Vehicle Accidents 3 (1953).

The term "driver" will hereinafter be used to mean the insured.

[11]289 S.W.2d 512 (Ky. 1956).

[12]286 App. Div. 117, 141, N.Y.S.2d 449 (4th Dep't 1955).

[13]Both companies, however, knew of the accident. In *Tennant* the driver notified the company of the accident the day it occurred. 286 App. Div. at 118, 141 N.Y.S.2d at 451. In *Staples* the company also knew that plaintiff was pressing a claim. Plaintiff had in two letters informed the driver that he intended to sue. Two months before filing suit plaintiff received a reply from the company, requesting him to postpone litigation. 289 S.W.2d at 514.

[14]*E.g.*, Mo. Rev. Stat. § 506.240 (1949); N.J. Stat. Ann. § 39:7-3 (Supp. 1955); N.Y. Vehicle & Traffic Law § 52.

[15]Staples v. Southern Fire & Cas. Co., 289 S.W.2d 512, 515 (Ky. 1956).

[16]*Id.* at 514.

[17]286 App. Div. at 119, 141 N.Y.S.2d at 452.

[18]289 S.W.2d at 514; 286 App. Div. at 118, 141 N.Y.S.2d at 451. The condition is from the widely used National Standard Policy Provisions. See American Bar Ass'n, Insurance Policy Annotations 95 (1941); Appleman, Automobile Liability Insurance 225 (1938); Sawyer, Automobile Liability Insurance v. 285, 295 (1936).

[19]Except when modified by statute, any breach of the policy by the driver which avoids the company's liability to the driver will also preclude recovery from the company by the injured party. *E.g.*, New Jersey Fidelity & Plate Glass Ins. Co. v. Love, 43 F.2d 82 (4th Cir. 1930); Metropolitan Cas. Ins. Co. v. Colthurst, 36 F.2d 559 (9th Cir. 1929); Potter v. Great Am. Indemnity Co., 316 Mass. 155, 55 N.E.2d 198 (1944); Gerka v. Fidelity & Cas. Co., 251 N.Y. 51, 167 N.E. 169 (1929). For general discussion of the effect of a defense against the driver in suits by third party beneficiaries of the policy see 4 Corbin, Contracts 807 (1951). See also Dodge, *An Injured Party's Rights Under An Automobile Liability Policy*, 38 Iowa L. Rev. 116, 120 (1952).

[20]Leach v. Farmer's Automobile Interinsurance Exchange, 70 Idaho 156, 213 P.2d 920 (1950); Tennant v. Farm Bureau Mut. Automobile Ins. Co., 286 App. Div. 117, 141 N.Y.S.2d 449 (4th Dep't 1955); General Finance Co. v. Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co., 348 Pa. 358, 35 A.2d 409 (1944).

See note 35 *infra*.

tice provision; but by adopting a strict interpretation, it found that the policy had not been breached at all, and held the company liable. The court understood the policy to require the driver to forward the summons and complaint only when the driver or his representative actually received them. The court accordingly found that the driver was not in breach unless the summons and complaint had been received by the driver's "representative." The court then held that the term "representative" did not include the driver's statutory agent for service of process, the secretary of state. Thus, under the *Staples* interpretation, the standard policy does not condition the company's liability upon receiving notice whenever process is served on the secretary of state, but only upon receiving notice when the driver actually receives the process mailed to him.[21] In interpreting the policy, the court ignored the prejudice that may result from lack of notice. Instead, it reasoned that since insurance companies presumably know that default judgments are often obtained without actual service of process, the absence of an express disclaimer indicated that the company intended to assume the risk—a rigorous application of the rule that policies should be strictly construed against the insurer.[22]

Neither case reaches an adequate solution to the conflict between the notice provisions of the statutes and the standard policy provisions. *Tennant,* by adopting a broad interpretation of the notice requirement of the policy, denies recovery to an injured party who had followed a statutory procedure adopted to promote recovery. This broad interpretation will leave unsatisfied many judgments founded on valid claims. *Staples* promotes recovery, but imposes liability which seems broader than the risk contemplated by the company. Insurance companies may, of course, accept the risk imposed by *Staples.* But the risk is greater than insurance companies should bear; for the opportunity to defend is a valuable safeguard against excessive or fraudulent claims.[23] Insurance companies may consequently accept the suggestion of the *Staples* court and insert an express disclaimer in the standard policy. If the disclaimer survived strict interpretation by the courts, it would be a bar to many valid claims. On the other hand, the courts may, by very strict interpretation of a disclaimer, bind the company when it has not intended to be bound. Liability thus based on a strict interpretation of contract would, moreover, lead only to successive modifications of the notice provisions, each modification increasing litigation,[24] thereby offsetting the savings of time and expenses effected by nonresident motorist statutes.

The courts can attack the prejudice problem directly by opening the default judgment. The court which entered the default judgment normally has power to open it during the same term upon a showing of good cause.[25] In addition the court's power may extend beyond the term, either by statute[26] or by virtue of the court's in-

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[21]The court recognized that the driver would also be in breach if process had been received by an agent whom the driver himself had appointed. 289 S.W.2d at 514-15. The distinction between this situation and the case of an agent appointed by operation of law seems tenuous. The term "representative" used in insurance policies includes the driver's administrator, Holt, *Extension of Non-Resident Motorist Statutes to Non-Resident Personal Representatives,* 101 U. Pa. L. Rev. 223 (1952); it therefore was not intended to be limited to agents personally designated by the driver.

[22]See, *e.g.,* 3 Corbin, Contracts § 559 (1950).

[23]See, *e.g.,* Leach v. Farmers' Automobile Interinsurance Exchange, 70 Idaho 156, 213 P.2d 920 (1950); Stacey v. Fidelity & Cas. Co., 114 Ohio St. 633, 151 N.E. 718 (1926); Patterson, Essentials of Insurance Law 281-82 (1935).

[24]See Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract,* 43 Colum. L. Rev. 629, 633 (1943); Llewellyn, Book Review, 52 Harv. L. Rev. 700, 702-03 (1939).

[25]Barney v. Platte Valley Pub. Power & Irrigation Dist., 147 Neb. 375, 23 N.W.2d 335 (1946); Tims v. Holland Furnace Co., 152 Ohio St. 469, 90 N.E.2d 376 (1950); Cowden v. Little Rock Road Mach. Co., 263 P.2d 423 (Okla. 1953).

[26]*E.g.,* 22 Mich. Stat. Ann. § 27.1433 (1955) (motion to set judgment aside must be made within one year after entry); N.J. Rev. Rules 4:62-2 (1953) (court may grant relief within one year for mistake or neglect and other enumerated reasons; at any time for other reasons justifying relief); 1 Ore. Rev. Stat. § 18.160 (1953) (court has discretion to grant relief from judgment within one year after notice that judgment has been entered, upon a showing of mistake, inadvertance, surprise or excusable neglect).

herent power to issue just orders.[27] The courts have broad discretion in determining whether a party has shown good cause for opening a judgment;[28] it would not seem an abuse of discretion to permit a trial on the merits when the omissions of the driver or the foibles of the constructive service procedures prevented the company from defending earlier.[29]

Opening the default judgment will not unduly burden the injured party. The procedure suggested will first of all encourage him to notify the company himself when he brings suit against the driver;[30] for timely notice by the injured will prevent a later claim that breach, or prejudice, warrants opening the default judgment.[31] Usually the injured can readily give the company timely notice. He must of course learn the identity of the insurer. But the injured must nearly always locate the insurer before a judgment can be satisfied; and, as a practical matter, the injured will usually want to know whether the driver is insured before deciding to bring suit against him. Often the identity of the insurer can be obtained from the driver at the scene of the accident, from the accident report filed with the police, or from preliminary correspondence with the driver. If suit is commenced before the information can be obtained, deposition procedure will often be available.[32] The injured himself will then be able to notify the company of the suit and consent to its entering a late appearance for the driver. But even if the victim does not learn the insurer's identity until after judgment, the only burden upon the injured will be the presentation of proof that would have been necessary had the company received timely notice from

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[27]United States v. Jordan, 186 F.2d 803 (6th Cir. 1951) (judgment may be set aside when enforcement would be unconscionable); Rome Sales & Serv. Station v. Finch, 120 Pa. Super. 402, 183 Atl. 54 (1936) (opening default judgment is a substitute for a bill in equity to enjoin proceedings at law); Kelly v. Serviss, 114 Vt. 52, 39 A.2d 336 (1944) (courts of general jurisdiction have inherent discretionary power to set aside default judgments during or after term).

The judgment may also be opened outside of term when both parties consent. Reisman v. Central Mfg. Dist. Bank, 316 Ill. App. 371, 45 N.E.2d 90 (1942); Slattery v. Uvalde Rock Asphalt Co., 140 S.W. 2d 987, 992 (Tex. Civ. App. 1940) (dictum); *cf.* Harrison v. Osborn, 31 Okla. 103, 114 Pac. 331 (1911). Older cases, however, have held that consent alone is not sufficient; the court must still have power to open the judgment. Mayor & Aldermen v. Bullock, 6 Ark. 282 (1845); Anderson v. Thompson, 75 Tenn. 259 (1881); W. L. Moody & Co. v. Freeman & Williams, 24 Okla. 701, 104 Pac. 30 (1909).

[28]Tradesmen's Nat'l. Bank & Trust Co. v. Cummings, 38 N.J. Super. 1, 118 A.2d 80 (App. Div. 1955); Stein v. Greene 178 Pa. Super. 464, 116 A.2d 308 (1955); see also Levee Dist. No. 4 v. Small, 281 S.W.2d 614 (Mo. 1955) (appellate courts are less likely to overrule an order opening a default judgment than an order denying a motion to open).

[29]In the leading case of Yanuzzi v. United States Cas. Co., 19 N.J. 201, 115 A.2d 557 (1955), the insurer had received notice of suit through its agent, but the agent erroneously forwarded the notice to another insurance company. The court recognized that, although all conditions of the policy relating to notice had been performed, the insurer did not have an effective opportunity to defend the suit. The court deemed this an adequate reason for opening the default judgment obtained by the injured against the driver; it stated that opening the judgment was necessary to prevent undue prejudice to the company. Since the injured person failed to show that he would thereby be prejudiced, the court granted the motion, made by the company in the name of the driver, to open the judgment and defend the action.

The courts are more liberal in opening default judgments than in opening judgments entered after trial on the merits. Tradesmen's Nat'l. Bank & Trust Co. v. Cummings, *supra* note 28; Thomson v. Goubert, 137 Cal. App. 2d 153, 289 P.2d 887 (1955); Locke v. Peterson, 3 Utah 2d 415, 285 P.2d 1111 (1955).

[30]The injured not only could easily assume this task, but also is the party who benefits most when the company receives timely notice. See New Jersey Fidelity & Plate Glass Ins. Co. v. Love, 43 F.2d 82 (4th Cir. 1930); Metropolitan Cas. Ins. Co. v. Colthurst, 36 F.2d 559, 561-62 (9th Cir. 1929); *cf.* Culp, *Process in Action Against Non-Resident Motorists*, 32 Mich. L. Rev. 325 n.80 (1934) (collecting statutes which place on the injured, rather than a local official, responsibility for notifying the driver when process is served on the driver's agent).

[31]Royal Indemnity Co. v. Morris, 37 F.2d 90 (9th Cir. 1929); Slavens v. Standard Acc. Ins. Co., 27 F.2d 859 (9th Cir. 1928); see McClellan v. Madonti, 313 Pa. 515, 169 Atl. 760 (1934).

The standard policy specifically allows notice to be given "by or on behalf of the insured," which includes the injured. American Bar Ass'n, Insurance Policy Annotations 95 (1941); Appleman, Automobile Liability Insurance 225 (1938); Sawyer, Automobile Liability Insurance 295 (1936).

[32]Many state courts have statutory authority to order depositions requested by parties to suits being litigated outside the state. If the driver refuses to answer, he may be punished for contempt of the court that ordered the deposition. See Uniform Foreign Depositions Act; Note, 96 U. Pa. L. Rev. 241, 250-51 (1947). See also International Standard Elec. Corp. v. The Thetis, 132 F. Supp. 65 (S.D.N.Y. 1955) (insurance contract is within permissible scope of pre-trial discovery).

the driver or his representative.[33]

Opening the default judgment will adequately protect the insurance company. The company's opportunity to defend of course comes later than it would have if the company had received notice of the original summons and complaint; during the delay witnesses may have become unavailable.[34] But when, as in the principal cases, the company knew of the accident, the opportunity to answer the complaint and conduct the defense will place the company in the same position it would have been in had it also known of the original suit.[35]

Thus the courts can resolve the conflict between the standard policy notice provisions and the statutes by using existing procedural devices. A minority of states hold the insurer liable, even though the driver has breached a condition of the policy, unless it appears that the company was actually prejudiced by the breach.[36] In these states the courts may adopt the *Tennant* interpretation of the policy and find breach; actual prejudice would then be a material issue. If prejudice were found, the courts could then enter an interlocutory order staying the action against the company until it has had a reasonable time to move to reopen the default judgment.[37] If the company fails to take appropriate steps to open the default judgment, it should not be allowed to set up the defense of prejudice by lack of notice. The majority of states, however, bar recovery whenever the policy has been breached, regardless of whether the company has actually been prejudiced.[38] These

[33]At the default proceeding, the injured usually is not required to introduce evidence supporting his cause of action, since defendant's failure to answer admits the material allegations of the complaint. *E.g.*, Greene v. Greene, 76 Ga. App. 225, 45 So. 2d 713 (1947); Putney v. Du Bois Co., 240 Mo. App. 1075, 226 S.W.2d 737 (1950). In a few jurisdictions, however, the plaintiff must prove his cause of action. See A. J. Hodges Industries, Inc. v. Fobbs, 39 So. 2d 91 (La. App. 1949); Gimbel Bros. v. Corcoran, 15 N.J. Misc. 538, 192 Atl. 715 (Sup. Ct. 1937); Leglar v. Pittsburgh C.C. & St. L. R.R. 284 Pa. 521, 131 Atl. 363 (1925).

Plaintiff must offer evidence to support his claim for damages when, as in tort actions, the amount of damage is unliquidated. *E.g.*, Thorpe v. National City Bank, 274 Fed. 200 (5th Cir. 1921); Edelstein v. Hub Loan Co., 130 N.J.L. 511, 33 A.2d 829 (1943); O'Connell v. Schumer, 266 App. Div. 138, 41 N.Y.S.2d 279 (1st Dep't 1943).

Insurance companies may seldom find it profitable to relitigate the question of damages suffered if courts in default proceedings exercise their power to appoint court experts. See N.Y. Times, Jan. 24, 1956, p. 33, col. 5 (court appointed medical experts reduced exaggerated claims and promoted compromise in tort case). For general discussion of the power to appoint court experts see Sink, *The Unused Power of a Federal Judge to Call His Own Expert Witness*, 29 So. Calif. L. Rev. 195, 206-08 (1956); Uniform Expert Testimony Act § 1, 38, Colum. L. Rev. 369 (1938).

[34]See Commercial Cas. Ins. Co. v. Fruin-Colnon Contracting Co., 32 F.2d 425, 433 (8th Cir. 1929); Stacey v. Fidelity & Cas. Co., 114 Ohio St. 633, 151 N.E. 718 (1926); Note, 64 Yale L.J. 1208, 1213 (1955).

[35]If the accident is not reported, the possibility of prejudice to the insurance company is greater. Thus policies generally require "prompt" or "immediate" notice, or "notice as soon as practicable." The courts generally interpret these phrases to mean notice that is "reasonable in the light of all the circumstances." *E.g.*, Hendrix v. Employers Mut. Liab. Ins. Co., 102 F. Supp. 31 (E.D.S.C. 1952); Gibson v. Colonial Ins. Co., 92 Cal. App. 2d 33, 206 P. 2d 387 (1949); State Farm Mut. Automobile Ins. Co. v. Cassinelli, 67 Nev. 227, 216 P.2d 606 (1950). *But see* Farm Bureau Mut. Automobile Ins. Co. v. Manson, 94 N. H. 389, 54 A.2d 580 (1947) ("as soon as practicable" may give insured greater latitude than "immediately").

The company's liability is avoided by failure to report the accident. *E.g.*, Standard Acc. Ins. Co. v. Turgeon, 140 F.2d 94 (1st Cir. 1944); Stacey v. Fidelity & Cas. Co., *supra* note 34. *But see* Edwards v. Fidelity & Cas. Co. 11 La. App. 176, 123 So. 162 (1929). Nevertheless, if it could be shown that no actual prejudice resulted, the same rationale for opening a default judgment should apply. For examples of circumstances that have excused the insured's delay in giving notice, see, *e.g.*, Hendrix v. Employers Mut. Liab. Ins. Co., *supra* (lack of knowledge that accident had occurred); Reid v. Monticello, 44 So. 2d 509 (La. App. 1950) (belief that policy did not cover accident); Munal Clinic v. Applegate, 273 S.W.2d 712 (Tenn. App. 1954) (reasonable belief that no liability would ensue). *But see* State Farm Mut. Automobile Ins. Co. v. Cassinelli, *supra* (belief that policy had lapsed is no excuse). Generally when the delay has been held excusable under the circumstances, the courts have also found that the company was not prejudiced by the delay. See notes 36, 38 *infra* and accompanying text.

[36]*E.g.*, Gibson v. Colonial Ins. Co., 92 Cal. App. 2d 33, 206 P.2d 387 (1949) (presumption of prejudice is rebuttable); Frank v. Nash, 166 Pa. Super. 476, 71 A.2d 835 (1950) (company has burden of showing prejudice); Calhoun v. Western Cas. & Surety Co., 260 Wis. 34, 49 N.W.2d 911 (1951) (statute places burden of showing no prejudice on injured).

[37]The courts always have discretion to stay an action, pending the determination of other litigation. See cases collected in Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949).

[38]*E.g.*, Standard Acc. Ins. Co. v. Turgeon, 140 F.2d 94 (1st Cir. 1944); State Farm Mut. Automobile Ins. Co. v. Cassinelli, 67 Nev. 227, 216 P.2d 606 (1950). See also Simmon v. Iowa Mut. Cas. Co., 3 Ill. 2d 318, 121 N.E.2d 509 (1954) (prejudice is not material element, but is relevant to question of breach); cases collected in Annot., 18 A.L.R.2d 443 (1951).

states can also resolve the conflicting interests under existing procedures: they could adopt the *Staples* interpretation of the policy and find no breach; they could then suspend judgment for the injured party until the company is able to open the default judgment. In any event, these states should not bar recovery if an opportunity to open the default judgment is present. In view of the adequate protection this opportunity affords the insurer, and of the policy underlying the nonresident motorist statutes of compensating automobile accident victims, courts should grant recovery whenever breach has not caused actual prejudice. And, since insurance companies may ultimately preclude the *Staples* result by more careful drafting, the better method of granting recovery is to follow the minority view and the *Tennant* interpretation.

Your Automobile Insurance Client

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ONE OF the biggest boons to the lawyer and his practice in recent years has been the continuing rise in the number of automobiles in America, coupled with the growth of the automobile casualty insurance industry. With government statisticians estimating that 2,200,000 additional automobiles per year will be crowded on highways that have difficulty handling the staggering 1955 total of 58,000,000 registered vehicles,[1] it is readily apparent that the lawyer who adequately represents insurance company clients will enjoy an ever increasing business. Indeed, by 1965 the number of motor vehicles will have increased to 80,000,000 with America on wheels traveling 814 billion vehicle miles, or a 45% increase over today's total. By 1975 it is estimated that there will be 92,000,000 vehicles on the road traveling an estimated trillion vehicle miles.[2]

In 1954, 2,100,000 motor vehicles were involved in accidents resulting in injuries to 1,900,000 people. The average death toll of over 100 people killed per day is appalling.[3]

Automobile insurance companies are rapidly multiplying to meet the needs of the motoring public which is growing as fast as our population. Both the regular population and the driving population is increasing at the rate of 2,500,000 a year. By 1965 half the people in the country (96,000,000) will be licensed to drive if present trends continue.[4] Thanks to financial responsibility laws in almost every state and increasing publicity, the motorist is beginning to realize that death or financial ruin may lie in wait around the next turn and is protecting himself accordingly with insurance.

A large percentage of the cars on the highway are now covered by liability insurance. Because of this wide spread coverage, judgments are now collectible by the plaintiff and the defendant's attorney is assured of an adequate fee for his representation.

Every lawyer is aware of the tremendous number of damage suits arising out of automobile accidents that clutter the courts today. They account for over 70% of the litigated cases,[5] yet they represent only a small percentage of the claims actually filed against insurance companies. The vast majority of claims are settled

[1]The Case of The Obsolete Highways by Richard Thruelsen, 5 Feb. 1955 issue of the Saturday Evening Post, p. 28.

[2]Ibid.

[3]The Traveler Insurance Companies' 1955 Book of Street and Highway Accident Data, "Misguided Missiles."

[4]Alabama Journal page 1-c 28 Nov. 1956, Montgomery, Alabama quoting Universal CIT Credit Corporation.

[5]A Change is Inevitable: Problems of Automobile Accident Litigation by Ella Graubart, Vol. 42 No. 9, The American Bar Association Journal, September 1956 p. 821.

without going to suit. One large casualty company boasts in national advertising that it has only 2.7 suits per $100,000.00 of auto liability premium earned.[6] Many leading companies quote smaller percentages than this.

However, even this small number is sufficient to create an ever increasing demand for able attorneys who can prepare and try a lawsuit in behalf of the defendant for the insurance company.

Unfortunately, many competent attorneys who would like to represent insurers do not get insurance business because they do not realize the problem of the insurance industry in connection with its claims. These attorneys, when they are selected by an insurance company to try a case, fail for many reasons to be reemployed even though they may successfully defend the suit.

The most common failure of counsel arises from ignorance of the importance of reserves to the company. Once he realizes that the entire claims structure is built around reserves, then his duty to his client becomes clear.

As soon as an accident is reported to a company a reserve in the form of money is earmarked and set aside for the payment of the claim. Obviously the preliminary loss report may not contain all the facts so that adjustments are made from time to time.

It is the lawyer's duty to see that the company is informed of all factors affecting the case while it is in his hands so that the reserve in each instance will be adequate.

Most companies maintain their reserves on a per case basis which means that each case is evaluated separately and a value set thereon based on the facts available. Other methods such as the average reserve basis are used. However, the claims manager will always evaluate his suits for settlement purposes on a per case basis no matter how his reserves are kept.

The importance of reserves cannot be overestimated. It is obvious in a society where the average time to get a law suit to trial after it is set is 10 months,[7] and in large urban areas where delays of 3 to 4 years from accident to trial are common, insurance companies cannot accurately determine how much a given year's claims have cost them until 10 or 15 years have passed. Six year statutes of limitation for the filing of personal injury suits are common[8] while 10 and 15 year statutes on actions on the policy are not unusual.[9] The only way to meet such delays in a business world dependent on statistics is by the use of reserves.

Losses are computed by reserves. Reserves are the basis for determining the companies' earnings and dividends are paid accordingly. Rates are computed from experience and reserves. A modern casualty company cannot operate for long if its reserves do not reflect a true picture of its claims. Once the lawyer realizes that reserves are the keystone of the companies' successful operation his duty to inform the company of all aspects of the case is clear. Not only should the attorney immediately forward a summary of all facts to the company, but he should also evaluate the case as soon as possible, in the light of local conditions, for his client. Then he should make a definite recommendation as to settlement or trial. If settlement is in order then the top value for settlement purposes should be indicated.

In my own firm we, immediately upon receipt of the case, prepare a file brief based on the information furnished us by the company using the following form:

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[6]State Farm Auto Insurance Co. advertisement in the National Underwriter (Nov. 24, 1955) No. 48, p. 37.

[7]Belli Modern Trials, Vol. 1 p. 51.

[8]Alaska, Col., Maine, Minn., N. H., N. D., S. C., Wis.

[9]10 yrs.—Ill., Indiana, Iowa, La., Missouri, N. C., W. V., and Wyoming. 15 yrs.—Ohio and Ky.

Re: File Number
Style of Case
Date of Accident
Suit Filed
Suit Served
Court
Court Number
Amount
Plaintiff's Attorney
Defendant's Attorney

	FILE BRIEF	Date
1. POLICY INFORMATION:	Company Policy Number Limits Claim Number Vehicle	
2. ASSURED:		
3. ASSURED DRIVER:		
4. CLAIMANT:		
5. CLAIMANT'S INSURANCE:		
6. EXHIBITS:		
7. DATE, TIME, AND PLACE OF ACCIDENT:		
8. INVESTIGATING OFFICER, NAME AND SUMMARY:		
9. WITNESSES:		
10. DESCRIPTION OF ACCIDENT:		
11. CLAIMANT'S INJURIES:	Bodily Injury: (BI) Plaintiff's Doctor Diagnosis Property Damage: (PD)	
12. CLAIMANT'S SPECIALS:	Hospital Doctor Dentist Drugs Nurse Lost Time From Work Others Total Property Damage Total	
13. ASSURED INJURIES:	Bodily Injury: (BI) Doctor Diagnosis Property Damage:, (PD)	
14. EXPECTED ALLEGATIONS OF NEGLIGENCE AGAINST OUR ASSURED DRIVER:		
15. SPECIAL PLEAS:		
16. DEFENSES RAISED IN ANSWER:		
17. LIABILITY:		
18. SUBROGATION:		
19. ADDITIONAL INVESTIGATION NEEDED:		
20. REMARKS:	1. Other insurance 2. Policy considerations or violations 3. Other facts of interest	

This serves as a summary for us and as a basis for our initial pleading, but it also serves the extremely important role of our first report to our client. A copy is forwarded to the insurance company, in most instances with our letter acknowledging receipt of the file. This establishes a common understanding of the facts of the case between us and the company upon which future correspondence and discussion can be based.

Our second report, which is rendered within 30 days, takes the form of a reserve data sheet based not, as was our original file brief, on the material sent us by the insurance company, but on our own investigation and interviews with the witnesses and parties. (See Appendix A).

This report seeks to evaluate the principals and witnesses in the light of the realities of trial practice. Such matters as their reputation, ability as a witness, availability as a witness, willingness to testify, etc., are covered.

A confidential report on opposing counsel is included covering his ability, experience, ethics . . .

At this point, our proposed pleas are listed and the applicable law reviewed, which leads us naturally to our evaluation and recommendation.

Since the human element is perhaps the most important factor in the trial of a damage suit before a jury, what are apparently duplications in the two forms often turn out to be our most enlightening sections insofar as the value of the case is concerned and serves to explain our recommendations.

Subsequent reports of facts gleaned by us are immediately forwarded to the company as are copies of all pleading, interrogatories, depositions, etc. Such reports serve to keep the company informed on what we are doing and as a documented basis on which the company can review our bill when it is submitted. In all cases a monthly report in the form of a letter is rendered. This monthly report, even if it is negative, serves the valuable purpose of keeping the attorney on top of the case so that the loose ends that sometime accumulate in a busy practice are tied up prior to the hectic week preceeding trial.

Such reporting, far from being time consuming, has actually saved us time in that it frequently results in early settlements of cases which should be settled, leaving us free for other matters. Since 9 out of 10 of the average lawyer's cases are disposed of without trial[10] a prompt settlement on an equitable basis is desirable for both the lawyer and the company.

One of the most valuable services rendered by the lawyer during his handling of the case is his ability to promptly secure medical reports and forward them to the company. By means of discovery, examinations by court appointed physicians, and personal friendship with the plaintiff's attorney he can frequently obtain detailed medical information that has been inaccessible to the company, thus enabling them to more accurately evaluate the claim for reserve purposes.

He should brief any unusual or novel points of law and call them to the company's attention. He will frequently find that the same problem has arisen in other cases in which the company was involved and that he will receive helpful citations and suggestions.

Immediately before the trial a report in the form of a pretrial summary is submitted. This is based on the previous reports and our trial brief. This summary consists primarily of changes that affect the case at the time of trial and is therefore brief since it refers to the previous reports whenever possible.

At this point the insurance company, the assured and the attorney have made their decisions based on the facts and the attorney fully understands his authority and duty to settle or try the case.

At the conclusion of the trial a full report should be submitted immediately reviewing the trial in detail. This should be done even though the results are phoned to the company. Claims managers, knowing that lawyers only talk about the cases won, express their human weaknesses thus:

Successful defense,
Phone expense.
Plaintiff prevails,
Letter avails.

All too frequently cases are assigned to an attorney who, after the third inquiry, acknowledges receipt of the file. The next contact the claims manager has with the attorney is in the form of a frantic phone call from the lawyer advising him that he is in the middle of the trial and has an offer to settle for $5,000.00 and that he had better take it. Considering the fact that the claims manager may have a $500.00 re-

[10]Address, "The Pillar of Justice", by Justice David W. Peck, Presiding Justice of the Appellate Division, First Dept., N. Y., Jan. 14, 1952.

serve on the case, his restraint is remarkable. $5,000.00 might be a good settlement under the circumstances, but the claims manager will never be sure because he was not kept informed. However, he will be sure never to use that lawyer again.

The failure on the part of the average attorney to adequately report the facts to his insurance company client has been recognized by the National Association of Claimants and Compensation Attorneys (NACCA). Many of their members, having come into the damage suit field as adjusters or defense counsel, recognize the failure of the average attorney to report to his company and therefore recommend and use the brochure approach[11] to be sure that the company obtains a complete picture on which it can base its decision. Unfortunately, I have seen too many of these brochures, complete with pictures, medical reports, diagrams, statements, etc., that, even though they represent the plaintiff's case in its most favorable light, give a better picture of the facts than the reports received from defense attorneys.

Another reason attorneys fail to be reemployed by insurance companies is the failure of the lawyer to know and appreciate his client. Many attorneys consider the assured the client, forgetting entirely that, under modern policies, the insurance company has the entire control of the suit, its trial or settlement.

Insofar as the lawyer is concerned his automobile insurance company client usually takes the form of the claims superintendent or resident adjuster, although he sometimes deals directly with the general counsel.

It, therefore, behooves the attorney to know something about the claims superintendent or manager who is his client. If you have not had the pleasure of meeting that gentleman, you should make it your business to do so because he wants to know you.

You will find him an experienced claims man who has come up from the ranks of the field adjusters. He probably has a law degree or law background. In any event he will impress you with a wide grasp of damage suit law which has come from many years of close contact.

The attorney should realize that here is a specialist who passes on more damage suits, or potential damage suits, in a day, than the average attorney handles in a year.

He knows the settlement value of injuries and claims, because he has devoted a large portion of his life to them. Given the same set of facts, he and his counterparts in other companies would not differ substantially in their evaluation of a claim. Since his evaluation of the case and the attorney is based on the facts at his command, the attorney must see that he has all of them.

His decisions are backed up by the research and experience of his general counsel. Many of the points the attorney encounters have probably been researched and briefed for him at some time during his experience with similar cases.

He knows the verdicts and trends of juries generally, and, from bitter experience, their uncertainties. Consequently all he asks of his trial counsel is a fully prepared and a well tried case. He understands when the occasional jury goes haywire and does not hold it against the attorney.

He recognizes and respects the attorney's knowledge and experience in his own area and, for that reason values highly the attorney's recommendations and evaluations.

The lawyer will find him a refreshing client who understands and appreciates the attorney's problems and is in a position to help solve many of them.

Probably the attorney's first contact with the claims personnel of the insurer will be through the adjuster. Depending on the number of insureds in the area and the company's policy, he will be either an independent or a salaried employee of the company. In any event you will find him to be a trained investigator who is experienced in investigating and evaluating liability claims. He probably has a law background although some companies prefer laymen. These companies maintain that the adjustment of liability claims is a practical common sense procedure which does not require legal training.

He operates under a code of ethics[12]

[11]Belli-Modern Trials, Vol. 1 p. 695.

[12]Adopted Jan. 8, 1939, by the Conference Committee on Adjusters and approved by the following organizations: American Bar Association, American Mutual Alliance, Association of Casualty and Surety Companies, International Claims Association, National Board of Fire Underwriters, National Association of Independent Insurance Adjusters, National Association of Independent Insurers.

and justifiably resents the attitude of some people who remember the antics of some of his predecessors of 20 or 30 years ago.

In any event, a good attorney, ever mindful of the expense involved, will utilize the salaried adjuster wherever possible and the independent, with the permission of the insurer, for all possible additional investigation and leg work. The company will appreciate the savings afforded it by the attorney's use of personnel for routine jobs who do not charge as much per hour as the lawyer must.

Of particular value to the insurance lawyer will be a general knowledge of the standard automobile insurance policy. Few people realize the extent to which the automobile policy has been standardized. Practically all companies write the same policy with only minor deviations to meet company policy or experience. Since insurance is a highly competitive field, a worth while innovation of one company will soon be followed by its adoption by its competitors and eventually it will find its way into the standard policy originally conceived by committees of the National Bureau of Casualty and Surety Underwriters, The American Mutual Alliance and the Insurance Law Section of the American Bar Association.[12]

It, therefore, follows that if the lawyer has a working knowledge of the standard policy he is well equipped to deal with almost any that he will encounter. Of invaluable aid to the interpretation of the standard policy is the book, "Insurance Policy Annotations" Vol. I, published by the Section of Insurance Law of the American Bar Association. While the policy therein annotated has been revised many times by the industry, the citations which have been supplemented by pocket parts as the policy changed are still of tremendous value in interpreting the contract.

While most policy violations will have been caught by the company long before the suit reaches the hands of the trial attorney, it occasionally happens that the lawyer will encounter a hitherto unknown one in his preparation for trial or during the trial. A working knowledge of the policy is therefore important so that he can recognize these contract breaches and pass them on immediately to the company for its decision as to coverage. Contrary to popular belief the industry affords coverage in the vast majority of the cases involving minor contract violations on the part of the insured.

The most difficult part of the lawyer's business is the fee. It is at this point that most attorneys, inexperienced in representing insurance companies, lose what might otherwise be a valuable client. They forget that the claims superintendent, dealing as he does with hundreds of lawyers and their fees, knows the value of the legal services rendered and what other attorneys charge for the same service throughout the area.

I have actually seen attorneys try to justify exorbitant fees on the basis of the amount of the claim defeated, knowing full well that in the average damage suit the amount sued for has little or no relation to the possible recovery. When called on such charges, these individuals are apt to exclaim with deep indignation:

"This is the first time in my thirty years of practice that any one has ever questioned my bill."

However, even at the risk of wounding the pride of such practitioners, the company will question bills that seem out of line—and rightly so. If the attorney can justify the charge, they will gladly pay it and, if he cannot and refuses to reduce it, they will quietly mark him off their list of approved personnel.

The attorney, in fixing his fee, should keep in mind the amount involved on the part of the company. While it varies in some localities and with some companies, the average liability policy will be for the minimum amount required by the state's financial responsibility law. In most instances this will only be $5,000.00 coverage for injury to one person. Unless the insured is well-to-do, this will probably be all of the collectible money involved in the suit regardless of the recovery. In the case of well-to-do insureds, they will normally have attorneys of their own to look after that portion of the claim that might exceed the policy coverage.

The most satisfactory method of billing is one that has as its basis the amount of time consumed. Insurance companies are perfectly willing to pay the lawyer for the reasonable time expended by him in behalf of their insured and his suit. They expect to pay more for successful results. The lawyer who can back up his statement with well documented time sheets will seldom have his bill questioned.

[12]Insurance Policy Annotations, Vol. 1 p. 9.

Some attorneys make the mistake of itemizing excessive charges for routine pleadings. Most good attorneys, at the call of the pleading docket, have a half-a-dozen or more cases to argue. It hardly seems fair to charge each client for a full day in court but all too frequently this is done. You can be sure that the claims manager notes such charges and is guided accordingly in the future.

The lawyer who has kept his client fully informed about the case as he develops it will find that his bill and its supporting data have practically been written for him in his periodic reports to the company. He only has to take his file and itemize the events as they transpired, taking into consideration the time expended, the difficulties of the case and the results obtained, to determine a fair charge that will be acceptable to his client. In all cases he should itemize his bill in detail. When that is done, he will often find that the work done justifies a larger fee than he had in mind.

Finally, your automobile insurance client will respect and approve of your efforts in the bar associations and your attendance at legal clinics and meetings. It will appreciate and value your efforts to keep abreast of the rapidly changing trial techniques of a well organized plaintiff's bar. It will know about your attendance because you will see its other representatives there.

We believe you will find your automobile insurance client a most satisfactory and rewarding one, if you will only take the time to understand its problems.

Appendix A.

CHECK LIST FOR RESERVE DATA SHEET

RE:

Plaintiff .....
vs.
Defendant .....

(IN THE ..... COURT OF
(..... COUNTY
(SUIT NO. .....
(CLAIM NO. .....
(ASSURED .....
(DATE OF ACCIDENT .....

AD DAMNUM

DEFENDANT (Here is listed the name, address, age, race, occupation, reputation, approximate net worth, if known, married or single, number of children, cooperation, ability as a witness, and any other pertinent data that would be material in the evaluation of him as a defendant.)

PLAINTIFF (Same data as for defendant.)

FACTS (Here is given a brief summary of the facts of the accident as you understand them.)

PLAINTIFF'S CONTENTIONS (Here is outlined what you believe the plaintiff's theory of the case will be and the facts by which he will attempt to show his theory, listing each main fact separately and evaluating it as to whether or not it is true or false and the plaintiff's chances of proving it as good, fair, poor, or impossible.)

DEFENDANT'S CONTENTIONS (See Plaintiff's Contentions.)

WITNESSES (Here is listed the name, address, age, race, occupation, reputation, approximate net worth, if known, married, single, number of children, ability as a witness, feelings as a witness (friendly, neutral, hostile); attitude as a witness (willing to testify, will testify if subpoenaed, reluctant to testify); availability as a witness (lives within fifty miles, lives over fifty miles, lives outside the jurisdiction of the court). List each witness separately giving the above data together with a brief summary of any previously unreported facts, if any, of which he can testify. Indicate whether or not your evaluation of the witness is based upon a personal interview with him in connection with this case or from information reported to you.)

HIGHWAY PATROL OR OTHER OFFICERS (Inasmuch as highway patrol or other officers are usually readily available to attorneys and are almost always witnesses in damage suits, who tend to

influence the jury greatly, they will be interviewed in person as a part of the regular routine and they are therefore, set aside separately. Answer as many of the pertinent questions suggested under the witnesses as is necessary to evaluate the highway patrolman's effect on the case.)

ADDITIONAL INVESTIGATION NEEDED (List here additional investigative work that needs to be done. This part of the report will be forwarded to the company adjuster in the area for immediate action.)

PLEAS (Here list your proposed pleas such as not guilty, contributory negligence, plea of recoupment, etc.)

LAW (Here list the violations of the rules of the road, the applicable rules of law involved which will control or affect the case, indicating any novel, unusual or new principles.)

PLAINTIFF'S DAMAGES (Here list all the pertinent new information concerning the injuries under the appropriate heading not previously reported.)

Bodily Injury: (describe.)

Property Damage: (describe and list amounts of estimates.)

DEFENDANT'S INJURIES (Here list all the pertinent new information concerning the injuries under the appropriate heading.)

Bodily Injury:

Property Damage:

EVALUATION OF OPPOSING COUNSEL (Give any pertinent comments as to the ability, experience in this type case, number of years in the practice of law, ethics and any other comments that are pertinent concerning the opposing counsel.)

EVALUATION AND RECOMMENDATIONS (Here put your evaluation concerning the case based on your knowledge as of the date of this report. Should the case be tried or settled? If you recommend settlement, what amount do you recommend in this case? What would be the highest verdict that a jury would be likely to give in this case? List recent verdicts in cases of a similar nature in your county.)

The Achilles Heel Of The Compensated Surety Doctrine

JOHN P. SANDIDGE*
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IN THE realm of banking concerning liability for forgeries of checks of depositors, there has been a constant conflict of authority between the various states upon the doctrine of subrogation of the depositor's fidelity insurer when an employee has forged a check or an endorsement thereon. It is the general rule in most states that a bank which pays a forged check or upon a forged endorsement must bear the loss. It is the bank's duty in cashing a check to pay only on genuine endorsement or signature of the payee, and such duty is an absolute one requiring the bank to ascertain at its peril whether the endorsement or signature on the check is genuine. If the endorsement is a forgery, and the bank pays the check, the loss falls on the bank regardless of its good faith and lack of negligence. This general rule is applied unless the party against whom it is sought to be enforced is precluded from setting up the forgery or want of authority.

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K. R. S. 356.023; *Kentucky Title Savings Bank & Trust Company v. Dunavan,* 205 Ky. 801, 266 S. W. 667; *Commercial Bank of Grayson v. Arden & Fraley,* 177 Ky. 520, 197 S. W. 951; *United States v. Citizens Union National Bank,* 40 F. Supp. 609 (W.D., Ky.); *Security-First National Bank v. United States,* 103 F. 2d 188 (9 Cir.).

A number of states, including Kentucky, regard the doctrine of subrogation, although enforceable at law, as equitable in nature. It is called into play only when it is necessary to bring about an equitable adjustment between the parties. In cases involving forged checks or forged endorsements, the rule had been reaffirmed in Kentucky in *Louisville Trust Company v. Royal Indemnity Company,* 230 Ky. 482, 20 S. W. 2d 71, that a compensated surety of the depositor was not entitled to subrogation upon paying a claim made against it pursuant to its bond when the depositor's surety sought to recover against the bank

upon the contract rights of the depositor.[1] The view was taken that the employment of the dishonest agent by the depositor was the proximate cause of the loss rather than any want of care on the part of the bank. Although the rule as to responsibility for the loss as between the bank and the employer is settled imposing liability on the bank, the courts in some states have taken the view that, due to its extreme harshness, they would not go further and hold the equity of the compensated surety of the depositor's agent to be superior to that of the bank which received no benefit from the transaction. *Louisville Trust Company v. Royal Indemnity Company,* 230 Ky. 482, 20 S. W. 2d 71. In this situation it has been stated that the rule to be applied is that where one of two innocent persons must suffer loss by fraud or misconduct of a third person, he who first reposes the confidence and commits the first over-sight must bear the loss. Moreover, it was held the surety was paid for this risk and since the surety was merely carrying out its contract, it had no equity. *Commonwealth, for use of Coleman, et al. v. Farmers Deposit Bank of Frankfort,* 264 Ky. 839, 95 S. W. 2d 793. See also *Maryland Casualty Company v. Walker,* 257 Ky. 397, 78 S. W. 2d 34.

However, in applying the compensated surety doctrine it has also been held that subrogation may be granted the surety of the depositor's agent upon the unfaithful conduct of one of the depositor's employees where it was alleged and proven outright notice to the bank which aided in the fraud, and further noted that denial of relief to a compensated surety was not to be taken as a matter of course, although this fact may be considered in balancing the equities. *National Surety Corporation v. First National Bank of Prestonsburg,* 278 Ky. 273, 128 S. W. 2d 766, 770.

A number of states, although acknowledging that subrogation is an equitable doctrine, have refused to state that on balancing the equities the surety of the depositor's employee did not have an equity equal to that of the bank that had paid upon a forged endorsement or check. *National Surety Company v. National City Bank,* 184 App. Div. 771, 172 N. Y. S. 413; *Liberty Mutual Insurance Company v. First National Bank of Dallas,* 245 S. W. 2d 237 (Texas); *Royal Indemnity Company v. Poplar Bluff Trust Company,* 223 Mo. App. 908, 20 S. W. 2d 971; *Borserine v. Maryland Casualty Company,* 112 F. 2d 409 (8 Cir.). An excellent discussion of this theory is contained in *Standard Accident Insurance Company v. Pellecchia,* 104 Atl. 288, 15 N. J. 162, wherein subrogation was allowed a compensated surety against the bank where a depositor's agent had forged endorsements and paper. At page 301-303 the court discussed the doctrine of superior equity in favor of the bank on the ground that as between two innocent parties the bank was the most innocent, and the surety should not be permitted to recover money because it was merely paying out what it had contracted to do, and refused to follow it. The court held there was no "windfall" to the surety because the surety has borne the expense of paying the agent's commission on the writing of the bond, the expense of investigating the claim and settling or litigating it, and that amounts of recovery by subrogation are taken into consideration in arriving at the amounts of the premiums to be charged for surety bonds. While the bank had guaranteed prior endorsement, such a guarantee is a business risk assumed by the collecting bank for the benefit of subsequent endorsers and especially for the benefit of the drawee bank which has no way of determining the genuineness of the endorsements. The court specifically pointed out that against the possibility of such loss, the bank generally insured itself. Thus, there would be no superior equity in the bank for in actuality it would suffer no loss.

In those states adopting the compensated

[1] 83 C. J. S., Sec. 54, page 687, note 89; *National Surety Corporation v. Edwards House Company,* 4 So. 2d 340, 191 Miss. 697; *American Surety Company of New York v. First National Bank,* 96 F. 2d 813 (3 Cir.); 83 C. J. S., Sec. 54, page 688, Note 98, 99 (7); *American Surety Company of New York v. Lewis State Bank,* 58 F. 2d 559 (5 Cir.); *Meyers v. Bank of America,* 11 Cal. 2d 92, 77 P. 2d 1084; *J. G. Boswell Company v. W. D. Felder & Company,* 103 Cal. 2d 92, 230 P. 2d 386; *Jones v. Bank of America,* 49 Cal. App. 2d 115, 121 P. 2d 94; *Northern Trust Company v. Consolidated Elevator Company,* 142 Minn. 132, 171 N. W. 265, 4 A. L. R. 510; *Buskirk v. State Planters' Bank & Trust Company,* 113 W. Va. 764, 169 S. E. 738; Sheldon on Subrogation, sec. 4; 5 Pom. Eq. Jur., 2d Ed., sec. 2349; 60 C. J. on Subrogation, sec. 18; *Bell v. Greenwood,* 229 App. Div. 550, 242, N. Y. S. 149; *American Surety Company v. Citizens' National Bank of Roswell, N. M.,* 294 F. 609, 616; *American Bonding Company v. State Savings Bank,* 47 Mont. 332, 133 P. 367, 46 L.R.A. N.S., 557; *Randell v. Fellers,* 218 Iowa 1005, 252 N. W. 787; *Washington Mechanics' Savings Bank v. District Title Insurance Company,* 62 App. D. C. 194, 65 F. 2d 827; *New York Title & Mortgage Company v. First National Bank,* (8 Cir.), 51 F. 2d 485, 77 A. L. R. 1052; *United States Fidelity & Guaranty Company v. Wooldridge,* 268 U. S. 234, 45 S. Ct. 489, 69 L. Ed. 932, 40 A. L. R. 1094.

surety rule there has been a legal blockade of any salvage in this situation. This had remained so in Kentucky for numerous years for it was generally not provable that the bank had any knowledge of the forgery or fraud such as would make its equity of a lower state than that of the surety company of the depositor's agent. However, a method has been devised whereby the compensated surety doctrine may be nullified through the cooperation of the employer and the surety company of the employee.

In *Reynolds Metals Company v. Liberty Natoinal Bank & Trust Company*, 294 S. W. 2d 921 (Ky.), Reynolds Metals Company brought an action against the Liberty National Bank & Trust Company to recover $17,170.80 which was alleged to have been wrongfully charged to the Reynolds' account in the bank as a result of forgeries of checks and endorsements by Murdock, one of Reynolds' employees. The trial court entered summary judgment dismissing the action on the ground that Reynolds was not the real party in interest.

Reynolds carried fidelity insurance covering its employees with the Federal Insurance Company. After the forgeries were discovered Reynolds and the insurance company entered into discussions concerning the payment of the loss. These discussions culminated in a letter from the insurance company to Reynolds in which the insurance company admitted its liability and stated its willingness to pay the loss. However, the insurance company requested that Reynolds first bring an action against the Bank to recover the loss, and that Reynolds withhold a demand for payment from the insurance company for a reasonable period of time necessary to prosecute the action against the Bank. The insurance company was to pay the expense of the suit against the Bank, prosecute it by the insurance company's attorney, and to have charge of the case. It was clearly stated and proved that the purpose of the insurance company in not paying the loss and then suing the bank as a subrogee of Reynolds was because such a course would lead to no recovery under the compensated surety doctrine as applied in Kentucky. Reynolds was agreeable, and an action was commenced in Reynolds' name. No payment at all was made to Reynolds by the surety company.

Upon appeal from the trial court's order dismissing the action, the Court of Appeals of Kentucky held that Reynolds was the real party in interest in that it was the person entitled to recover the fruits of the litigation. Reynolds had an actual and substantial interest in the subject matter as the loss would not affect its premium rate if a recovery was made, and, in addition, Reynolds also, by substantive law, possessed the cause of action sought to be prosecuted.

The court went on to point out that in this situation Reynolds' position was stronger than that of the insured in the so-called "loan receipt" cases. *State Farm Mutual Auto. Insurance Company v. Hall*, 292 Ky. 22, 165 S. W. 2d 838; *Aetna Freight Lines, Inc. v. R. C. Tway Company*, 298 S. W. 2d 293. This was true because no money had actually been turned over by the insurer to the insured. *Liberty Mutual Insurance Company v. First National Bank of Dallas*, 245 S. W. 2d 237 (Sup. Ct. of Texas) overruling 239 S. W. 2d 738, approving the use of a "loan receipt" to depositor. Contra, *Hensley-Johnson Motors v. Citizens National Bank of Bellflower*, 264 P. 2d 973 (Calif.), where it was held there was an election of remedies. Compare *Borserine v. Maryland Casualty Company*, 112 F. 2d 409 (8 Cir.), where there was no election by mere demand on employee and surety.

The court further pointed out as to the argument that this agreement was a mere subterfuge designed to evade the compensated surety doctrine, that it was immaterial as to what the motives of the parties were in making the agreement. Reynolds, if it desired, could have foregone any effort to collect from the insurance company, and proceeded against the bank. Any private negotiations between Reynolds and its insurer were of no concern of the bank so long as the negotiations did not reach the point of transferring Reynolds' claim to the insurer. In addition, the court noted that there was no election of remedies as no action had been brought against the insurance company on the bond.

The most unusual feature of the case, however, is the following quotation:

> "The asserted equities in favor of the bank disappear from the case when it is considered that the bank also is insured."

Although the opinion does not overrule any of the previous Kentucky cases upholding the compensated surety doctrine, it also, in one paragraph, states that there is no superior equity if the bank carries insurance against this type of loss. Thus, in Kentucky it would seem that an exception

to the compensated surety doctrine as to subrogation itself is made if the bank is also covered against the same loss by insurance. However, it cannot be said that the Reynolds' case wipes out the compensated surety doctrine, but it does show that by cooperation between the insured and the insurer courts are inclined to avoid the compensated surety doctrine if they are given the opportunity. This development goes hand in hand with the recognition in many states of the "loan receipt" method whereby subrogation does not come into play. *Luckenbach v. McCahan Sugar Refining Company,* 248 U. S. 139, 39 S. Ct. 53, 63 L. Ed. 170; *Bradley v. Lehigh Valley Railroad Company,* 153 F. 350 (2 Cir.); *McCann v. Dixie Lake and Realty Company,* 44 Ga. App. 700, 162 S. E. 869; *Merriman v. Cities Service Gas Company,* 11 F.R.D. 165 (S.D., Mo.); *Perrera v. Smolowitz,* 11 F.R.D. 377 (E.D., N.Y.); 3 Moore's Federal Practice, Second Edition, Vol. 3, Sec. 17.09, page 1349; *Augusta Broadcasting Corporation v. United States,* 170 F. 2d 199 (5 Cir.); *Celanese Corporation v. John Clark Industries,* 214 F. 2d 551 (5 Cir.); *Petrikin v. Chicago, R. I. & P. R. Company,* 15 F. R. D. 346 (W.D., Mo.).

In Kentucky in *Aetna Freight Lines, Inc. v. R. C. Tway Company,* 298 S. W. 2d 293 (Ky.), under the "loan receipt" doctrine the question of the real party in interest was decided on the basis of a procedural matter and not on the basis of substantive law. Thus, under a "loan receipt" agreement made in Ohio where such an agreement is treated as payment (*Cleveland Paint & Color Company v. Bauer Manufacturing Company,* 97 N. E. 2d 545), the question of whether or not the insurer may bring the action in the name of the insured is a question of local procedure. Thus, the court permitted the action to be brought in the name of the insured. At the same time it is to be noted that any method that is fair and prevents prejudice to the legal rights of the insurance company will be protected. As noted at page 296 in the *Aetna Freight Lines* case,

> "There is no room in our system of jurisprudence for the operation of prejudices, whether they be against insurance companies, manufacturers, or in favor of homeless children. Hence, we cannot say an agreement which is intended to avoid the operation of an undue prejudice is against public policy."

It is the general rule that courts will not permit the question of insurance to enter into a case where it will result in having an influence on the jury to return a large verdict. However, at the same time in a question concerning whether or not the equities of the parties are equal, the fact that both parties are insured will affect the result and equalize the adversaries.

From the above discussion it seems that the compensated surety doctrine will not be extended if the courts may be shown a reasonable way to avoid such a result. The entrance of insurance on both sides of the question has undoubtedly affected the result, and made the doctrine of the superior equity of the bank one of no merit. In the case of *Standard Accident Insurance Company v. Pellecchia, supra,* this was one of the main grounds given for not utilizing the compensated surety doctrine. In Kentucky it was one of the grounds considered in overruling a motion for summary judgment in favor of the bank. Thus, it is clear that the Achilles heel that will ultimately spell the death of the compensated surety doctrine is the fact that the banks now carry insurance covering their liability for forgery or false checks erroneously charged against the account of the depositor. The realities of the situation have vanquished a doctrine that resulted from prejudice against insurance companies, and the arrow from Paris's bow that killed this doctrine was the insurance industry itself in making available to the banks coverage against loss from forged or raised checks or endorsements.

A Proposal For A Tort Law Institute

MARLIN M. VOLZ*
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AT THE mid-winter meeting of the American Bar Association the name of the Insurance Section was changed to the Section of Insurance, Negligence and Compensation Law and its functions were correspondingly enlarged. It is the suggestion of this writer that this new section, which will now include both plaintiffs' and defense attorneys, give consideration to the establishment of a Tort Law Institute to be organized along the lines of the American Law Institute, except that its activities would be confined to torts and procedures for the disposition of tort claims.[1]

Torts occur in direct proportion to the opportunity of people to come in contact with each other and with moving objects. Modern conditions, particularly rapid population growth, and spectacular advances in motorized transportation, provide abundant opportunity which Americans in their characteristic fashion have not neglected to take advantage of in killing and maiming each other and themselves in record-breaking numbers. The disposition of the millions of tort claims which annually arise is big business. Big hardly describes it. It is stupendously colossal business, jamming court dockets by contributing three-fourths of the litigated cases, easily providing more legal employment than any other phase of law, and inspiring NACCA, the answers to NACCA, and more ferment in tort law than perhaps in any other period in history.

Illustrative of this ferment are the many institutes and seminars, new journals, three new automobile insurance policy forms in as many years, new law school courses in law medicine, demonstrative evidence and other subjects, the Chicago Law School's jury study, the institute of Judicial Administration of New York University, the Insurance Law Center at Southern Methodist University, the Law-Science Institute at the University of Texas, the casualty claims program at our law school, and many others. But no organization has yet attempted to deal with the entire subject of adjusting tort law and procedures to best meet the requirements of modern society and serve the welfare of the general public. This would be the function of the Tort Law Institute which is here proposed.[2]

The purpose of the American Law Institute, as stated in its charter, might also serve as the objective of the Tort Law Institute but limited to the field of torts, namely, "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice and to encourage and carry on scholarly and scientific legal work."[3] As in the case of the American Law Institute, it is proposed that the direction of the Tort Law Institute would be in an elected council consisting of members representing the bench, the law teaching profession and the bar, with a sufficiently large number of unlabeled lawyers so that the organization could be completely objective and above any criticism that it was dominated either by the plaintiffs' group or by the defense. Such a Tort Law Institute could give direction to a study of the entire operation of tort law, propose changes in the substantive or procedural law where indicated, objectively evaluate and appraise the results of studies done by others, the merits of new proposals and the virtues of certain legislative enactments, push for more uniformity in tort law among the states, and all in all offer intelligent and balanced leadership to the orderly adjustment of tort law and procedures to more efficiently and justly meet the needs of modern society. The Institute would be able to determine if piece-meal changes in

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[1] If it is thought that the creation of a separate Tort Law Institute would duplicate and overlap the functions of the American Law Institute, it is hoped that the latter will give intensive and comprehensive study to the matters raised in this article.

[2] The results of its research and discussion might result in a uniform or model law covering matters where legislation is thought advisable.

[3] Herbert F. Goodrich, *The Story of the American Law Institute,* \1951 Washington University Law Quarterly at 285 and 286.

tort law and procedures, often proposed by particular pressure groups, were in harmony with the total picture and in the interest of the general public. The object would be to resist unwise legislation as well as to encourage desirable changes.

The time is ripe for a thorough study of tort law in the light of present conditions and of procedures for its application. These are but some of the topics undergoing current discussion and which would be worthy of such study:

1. Should there be rules of court to govern the use of demonstrative evidence at all of the principal stages of trial, i.e., opening statement, examination of witnesses, summation?[4]

2. Are there instances in which absolute liability should replace the concept of fault?[5] If so, should damages be limited as in workmen's compensation?

3. Should immunity from suit accorded to government, charitable institutions, parents and spouses in many instances be maintained or further contracted?

4. Would a uniform wrongful death statute be feasible and advisable? Should such a statute be urged for incorporation in international treaties to govern foreign travel?[6]

5. What are the merits or demerits of the following statutes or proposals and should their use be expanded or restricted:

a. Of a "guest" statute such as is in effect in Kansas and other states?[7]

b. Of comparative negligence statutes such as that in Wisconsin?[8]

c. Of a statute fixing the liability of an owner for the operation by another of his automobile as in Iowa?[9]

d. Of the plan of the Honorable Samual H. Hofstadter, Justice of the New York Supreme Court, for the handling of personal injury claims by a panel of three instead of a jury?[10]

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[4]Some of the questions posed by Spurgeon L. Smithson, Kansas City, Missouri, attorney, at a panel discussion on this subject, may be suggestive:

Could a helpful rule be formulated something along this line: demonstrative evidence and the use of blackboards and easels will not be permitted during an opening statement unless counsel applies to the court for permission to do so before the beginning of the opening statement and obtains such permission?

Would a rule be helpful in substance providing that if demonstrative evidence other than the usual photographs or plats is to be introduced, then the proponent of such evidence, before bringing the same into the presence of the jury, shall apply to the court outside the presence of the jury for permission so to do?

What about the helpfulness of a rule under which the court may indicate proper conditions and timing for the removal from the court room or the observation of the jury of demonstrative evidence which may be a distraction after seen and considered by the jury?

What about the helpfulness of a rule that if counsel wishes to use the blackboard during the hearing of the evidence he should apply to the court for leave so to do outside the presence of the jury and at that time the court may consider either on the court's own motion or on the application of opposing counsel what order shall be made about removing such subject matter from the blackboard?

Should counsel be permitted to write down on a blackboard the answer of a witness to a question, or is this a matter of undue emphasis and should it be forbidden by court rule or otherwise?

If counsel puts something on the blackboard during his argument would a rule be helpful that he shall erase it at the conclusion of his argument or turn the blackboard around unless opposing counsel requests otherwise?

[5]As to absolute liability in other countries see 42 Cornell Law Quarterly 61, note 14.

[6]See Clifford W. Gardner, *So You're Going to Fly to London,* 43 American Bar Association Journal 413 (1957), wherein the author states that under the Warsaw Convention Treaty recovery is limited to $8,291.87.

[7]Kan. Stats., Sec. 8-122b, provides: "That no person who is transported by the owner or operator of a motor vehicle, as his guest, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or damage, unless such injury, death or damage, shall have resulted from the gross and wanton negligence of the operator of such motor vehicle."

[8]The comparative negligence statute of Wisconsin (1957 Wis. Stats. Sec. 331.045), provides: "Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering."

As to the states and foreign countries having comparative negligence see 42 Cornell Law Quarterly 66, Note 35.

[9]The Iowa statute (I.C.A. Section 321.493) states: "In all cases where damage is done by any car by reason of negligence of the driver and driven with the consent of the owner, the owner of the car shall be liable for such damage."

[10]Under this plan, automobile accident cases would be assigned to special courts and heard before a three-man tribunal, composed of a jurist, a layman and a physician, with the principle of comparative negligence substituted for the rule of contributory negligence. The concept of liability based on fault is retained. Samuel H. Hofstadter, *Alternative Proposal to the Compensation Plan,* 42 Cornell L. Quar. 59 (1956).

e. Of the Medical Expert Testimony project of New York City?[11]

f. Of the Saskatchewan plan for determining compensation?[12]

g. Of the Pennsylvania Arbitration Act of 1952 for handling personal injury claims where agreeable to the parties?[13]

6. What is the preferred method of submitting negligence cases to juries; general verdict, special verdict, special questions?

7. Should standardized jury instructions be adopted? Should judges be allowed to comment on the evidence?

8. As to the jury, is it possible or desirable to reduce the number of jurors or eliminate the jury altogether in some cases?[14] How should the jury panel be selected?[15] Should there be a unanimous, three-fourths, five-sixths, or other verdict?[16]

9. Is there need to change venue statutes?

10. Should there be contribution between joint tortfeasors?

11. What may be done to further reduce court congestion and delay?[17]

The Tort Law Institute can provide the vehicle by which leaders of the plaintiffs' bar and of the defense bar may join forces in the noble cause of improving tort law and the administration of justice.[18] In this great effort lawyers must remember that they are not representing clients in working for the betterment of law but the greater glory of the law and the legal profession. It is lamentable that the lawyer too often continues to advocate the special interests of his clients even when laboring in the vineyard of law reform. The first duty of the lawyer must be the elevation of the law remembering in the words of Chief Justice Stone that, "The law itself is on trial in every case, as well as the cause before it."

It is contemplated that the Tort Law Institute would be a means of mobilizing the great talents of the trial bar to the cause of law and judicial reform. This would overcome the charge, largely directed at trial lawyers, that the bar is not sufficiently interested in improving legal institutions. For instance, the leading law reformer of our age has commented: "In the present state of affairs we cannot expect the judges or the lawyers for obvious reasons to effect fundamental changes; therefore improvements in the administration of justice in this country by and large must come either through the law schools or through an uprising of the public, as in England three-quarters of a century ago

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[11]This project is described in 63 Yale Law Journal 1023.

[12]A compensation plan was adopted by the Province of Saskatchewan, Canada, in 1946 and as amended is still in operation. Revised Statutes of Saskatchewan, Vol. IV, c. 371 (1953).

[13]See J. Harry La Brum, *Congested Court Calendars*, 43 American Bar Association Journal 311 (April 1957).

[14]Presiding Justice David W. Peck of the Appellate Division in Manhattan and the Bronx advocates a two-year experiment in which personal injury cases could be tried before judges instead of juries. He argues that the courts are up-to-date in all work except personal injury cases which take three times as long to try before a jury as they do before a judge alone.

[15]As to jury selection, Chief Justice Vanderbilt observed (1956 Washington University Law Quarterly 267, 285-286): "The jury is an integral part of the administration of justice and the selection of the panel from which juries are drawn should therefore be entrusted to the courts or to commissioners appointed by the courts. This has been done in thirty-three states, but in the remaining fifteen states the selection of the jury panel is in political hands, with the inevitable resultant dangers to the administration of justice. In many states the jury laws are antiquated and complicated. Qualifications for service and exemptions from service are frequently without rhyme or reason. Alternate jurors are not often provided for. It is difficult to understand why there has been so much neglect of matters so essential to effective judicial administration."

[16]The Chicago jury study may furnish many of the answers.

[17]The United States Attorney General's Conference on Court Congestion and Delay, Washington, D.C., May 21 and 22, 1956, adopted this resolution:

"It is agreed that it is not only desirable but essential to have court systems, State and Federal, where all persons having problems to be decided can have them adjudicated promptly, efficiently, fairly and impartially. Our judicial systems are noteworthy for their fairness, impartiality and ability to make just decisions in all causes. But it must be admitted that in some areas of the country, most notably in our larger cities, the time between when a case arises and when it is heard on the merits and decided is far too long. We recognize this as the foremost problem facing our profession today and one which we are professionally obligated to overcome."

[18]According to Chief Justice Vanderbilt, one of the main functions "of the lawyer is to do his part individually and as a member of the organized bar to improve the profession, the courts, and the law." From remarks made at the Conference on Professional Responsibility held at Seton Hall University School of Law, May 5, 1956.

and as in New Jersey a decade ago."[19] In a report of a Special Committee on the Administration of Justice of the Association of the Bar of the City of New York it was observed: "Popular demand for a modern system to meet modern needs has been frustrated by the inertia of the system itself."[20] And Mr. Justice Frankfurter has stated: "Every effort to effect improving changes is resisted on the assumption that man's ultimate wisdom is to be found in the legal system at the date at which you try to make a change."[21]

The problems which the Tort Law Institute would consider have "roots in the ancient soil of tort law, wherein the chief plowman has been the judge, notwithstanding his furrow may be covered up or widened by legislation."[22] But gaps or deficiencies in the common law must generally be cured by the legislator. The primary purpose of the Institute would be a more adequate tort law and procedures for its administration.

[19]From remarks by Chief Justice Vanderbilt at the Conference on Professional Responsibility held at Seton Hall University School of Law, May 5, 1956.

[20]Report of the Committee dated February 7, 1957.

[21]As quoted in Gardner, *The Machinery of Law Reform in England*, 69 L. Q. Rev. 46, 54-55 (1953).

[22]Mr. Justice Rutledge in *United States v. Standard Oil Co. of California*, 332 U.S. 301, 67 S. Ct. 1604, 91 L. Ed. 2067 (1947).

Report Of The Life Insurance Committee—1957

HAROLD A. BATEMAN, *Chairman*
Dallas, Texas

THE Life Insurance Committee of the International Association of Insurance Counsel respectfully reports:

(1) A meeting of the committee was held at The Greenbrier, White Sulphur Springs, West Virginia on July 11, 1956, and it was unanimously decided by those attending that the greatest service the committee could render to the association and its members would be the contribution of at least two good articles for the Journal during the year. Several members of the committee volunteered to prepare such articles.

(2) One of these articles, entitled "An Insurer's Liability for Mistake in its Policies", prepared by R. Harvey Chappell, Jr. of the firm of Christian, Barton, Parker & Boyd, Richmond, Virginia, appeared in the January, 1957, issue of the Journal at page 49.

(3) The other article, entitled "Promissory Notes as Payment of Initial Premium", written by Lawrence A. Long, of Long & Smart, Denver, Colorado, appeared in the April, 1957, issue at page 143.

In the opinion of your chairman, both of these articles were most interesting and the authors are entitled to the thanks of the membership for their scholary contributions.

Respectfully submitted,

Harold A. Bateman, *Chairman;* T. DeWitt Dodson, *Vice Chairman;* Payne Karr, *Ex-Officio;* Henry W. Buck, R. Harvey Chappell, Jr., Berkeley Cox, Verling C. Enteman, Eugene C. Gerhart, J. Harndon Hansbrough, Robert W. Lawson, Jr., Lawrence A. Long, Paul M. Roca, Joseph R. Stewart, Price H. Topping, Leslie R. Ulrich.

OF LAW AND MEDICINE

Medicolegal subjects, the doctor-lawyer relationship, medical evidence, expert medical testimony, medical malpractice and its trends, and similar topics, will be presented in this department. The Journal will be pleased to have its readers submit articles of this type, either written by them or which may come to their attention.

An Analysis of Medical Malpractice*

EDWARD H. BORGELT**
Milwaukee, Wisconsin

FOR SOME time now, we have all been more or less aware of the fact that medical malpractice claims have increased —and this is also true of the percentage of recoveries and the amounts awarded. (You no doubt have read the very excellent articles in regard to this phase of the subject in the Insurance Counsel Journal of January, 1956 by R. Crawford Morris, and in the Journal of April, 1956 by T. J. Blackwell.)

The general situation continues to grow progressively worse and obviously will continue to do so, unless something is done, in an effort to reverse the trend. Underwriters of this type of insurance are daily becoming more reluctant to cover doctors and there is a report of one doctor, a victim of a verdict in excess of coverage carried, who discontinued the practice of medicine because he did not feel that he could "afford the jury-imposed premium".

The increase in the number of claims and amounts awarded is bound to affect the continued advance heretofore made in the practice of medicine, and this means that society as a whole will suffer the greatest loss. While there are other personal interests, we believe that the foregoing is the over-riding consideration which should cause all of us to take an interest and an active part in attempting to reverse the trend. There is no single remedy or approach to the subject; the situation has become so serious that the American Medical Association Law Department, under Mr. C. Joseph Stetler, is devoting practically all of its time and effort in a survey of the entire subject.

There are no doubt a number of causes for the present situation, the elimination of which will require a varied approach, but there is a "grass roots" job to be done in which you can be of a great deal of assistance, if you will meet with your local medical society and discuss the subject with your doctor friends and give them the benefit of your own experiences, and your advice. Every lawyer has had experiences in his own cases which would be helpful to the doctors; and while we all have our own ideas in regard to the general subject, it is proposed to make a few observations and suggestions which may be of assistance in getting the movement started, to the end that experiences and suggestions from members of our organization can be accumulated, cataloged, and used in meetings with medical groups.

What Has Happened To The Doctor?

It is a matter of common knowledge that the medical profession has made tremendous strides in technique, diagnosis and treatment—to say nothing of the discoveries of the various wonder drugs which now bring about immediate relief and rapid cures in cases which heretofore were considered to be hopeless. With this advancement have also come some techniques which are in a sense daring—and perhaps dangerous—but the results obtained justify the means used, because often the case would otherwise prove fatal.

We all know that people are more claims-minded today—no doubt in part a by-product of years of "Cradle to the Grave" philosophies advanced by politicians. The increase in the amounts awarded to plaintiffs generally is at least partly explained by the increased cost of everything else, huge government spend-

*Submitted as the Report of the Malpractice Insurance Committee—1957.

**Of the firm of Quarles, Spence & Quarles; chairman, Malpractice Insurance Committee.

ing, deficit financing, lend-lease—and now just pure "aid" to foreign countries—any country, regardless of the climate or its past or even present attitude toward the United States. Also, we cannot overlook the effect of the "give away" television programs; in the eyes of many millions of viewers, it is very difficult to leave without bulging pockets—and the once fabulous "$64,000 Question" had to quadruple its awards recently to meet competition.

The doctor inherits all of this, too, but, in addition, he is faced with changed conditions of another nature. To begin with, he no longer occupies his former position on a pedestal. The old-fashioned family physician—family friend and general adviser—along with his mustard plaster and sulphur and molasses in the spring—have just about passed on into history; and with them went the patient-physician relationship which bound them so firmly together that malpractice claims were rare. We are now in an age of specialization. While formerly the family physician cared for the entire family, regardless of the nature of the ailment, now he is very apt to be the one who is first consulted, after which, and upon his advice, further examinations and studies are made by specialists in their respective fields—sometimes one, and sometimes two or three. In fact, some of the specialized fields have been further refined; the psychiatrist is no longer the top man on the totem pole in that group—now we have the analyst. (As we understand it, an analyst is a psychiatrist who has undertaken further studies and his preparation includes being himself psycho-analyzed.)

All doctors seem to be busy these days, and all good doctors are very busy. Many patients have been, at one time or another, told by the girl in the office of their regular physician, "The doctor does not have an opening for two months". If you press the subject she may take your name and telephone number—should there be a cancellation. Again, how many times have patients appeared at the doctor's office, at the appointed time, only to be required to wait as long as two hours—with little or no explanation? (And with baby sitters charging what they do).

If the foregoing sounds critical of the doctor, it is not so intended. It is believed to be a factual recitation of daily occurrences. And it is also a fact that the average doctor today—in every other way—is a much more capable practitioner than his predecessor. Some doctors will tell you that their fathers' patients would not have thought of questioning the advice given or the result obtained. Today, when a doctor proceeds upon the assumption that the average patient will accept his advice and treatment in the spirit in which it is given, and will not later attempt to twist the facts—to right a fancied wrong—he is not being realistic; he is making a business mistake. The many claims files attest to this fact. Many, otherwise "fine people", have "turned on their physician", in their zeal for cash. Why not? "Isn't the doctor insured—for that express purpose?"

Therefore it would seem to be necessary that the doctor should take precautions in order to reduce such experiences to a minimum. In every situation in which the patient's consent is necessary, it should be obtained in writing; and the same applies to hospitals. Frequently "issues of fact for the jury" could be eliminated by following this procedure. We have in mind patients who later claim that they thought they were going to the hospital merely for an examination, and not for an operation. Another example relates to authority to operate by a specialist, called in by the attending physician.

The majority of medical malpractice claims are actually without merit. It is not always possible to obtain a perfect result, even in the absence of malpractice; yet every case today, in which there is less than a perfect result, must be considered to be a potential malpractice claim. The surgeon is often called upon to make on-the-spot decisions and frequently the physician must choose between several procedures or methods which could be followed; they can only use their best judgment, as it appears at that time. The actual ability of a physician or surgeon—or his standing among his fellow doctors—is no criterion, when considering the subject of malpractice claims.

The Case Of Patient Vs. The Doctor

Medicine is not an exact science; some procedures and techniques of years ago would be criminal today. Much has been learned by probing for new and better methods, constant study, and hard work. If doctors are to become guarantors of the results in all cases and are to be assessed large sums in the alternative, obviously society will be the ultimate loser.

Formerly all of this was recognized by courts:

"To hold the doctor liable, the burden is on the plaintiff . . . ."

"A mere failure to diagnose correctly does not render a physician liable".

"Physicians are not compelled to choose at their peril between two accepted methods of treatment".

"Proof of a bad result raises no presumption of negligence".

"The law does not require impossibilities or even the exercise of the very highest degree of skill . . . ."

"Where the proof disclosed that a given result may have occurred by reason of more than one proximate cause, a jury will not be permitted to guess or conjecture as to which was in fact the efficient cause".

"The degree of care and skill (of a physician) can only be proved by the testimony of experts. Without such testimony the jury has no standard to enable it to determine whether the defendant failed to exercise the degree of care and skill rquired of him".

Of course the doctrine of *res ipsa loquitur* is not new; it was first resorted to in 1863 in the English case of *Byrne v. Boodle* (2 H.H. & C. 169 Eng. Rep. 299) in which a barrel of flour rolled out of a window and struck the plaintiff on the head.

In the case of *Ewing v. Goode,* 78 Fed. 442, Judge Taft, speaking for the court, said:

"Before the plaintiff can recover, she must show by affirmative evidence—first, that the defendant was unskillful or negligent; and, second, that his want of skill or care caused injury to the plaintiff. If either element is lacking in her proof, she has presented no case for the consideration of the jury. The naked facts that defendant performed operations upon her eye, and that pain followed, and that subsequently the eye was in such a bad condition that it had to be extracted, establish neither the neglect and unskillfulness of the treatment, nor the causal connection between it and the unfortunate event. A physician is not a warrantor of cures. If the maxim, 'res ipsa loquitur', were applied to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the 'ills that flesh is heir to'."

Some indication of the change of attitude—the modern trend—may be gained from the case of *Ybarra v. Spangard,* 25 Cal. 2d 486, 154 P.2d 687, in which the plaintiff was anesthetized in connection with an appendectomy and, after he regained consciousness, he became aware of an injury between the area of the right shoulder and neck which it was determined was traumatic and not systemic in origin. Suit was brought against the hospital and everyone in the operating room, including the family physician, the surgeon, the anesthetist, nurses and hospital attendants. There was no affirmative proof of negligence on the part of any of the defendants, but the court held all of them liable, under the doctrine of *res ipsa loquitur,* stating that each of the defendants had the burden of proving that he or she was not negligent.

It is an extreme case, of course—which the California courts later refused to follow generally—but it does demonstrate the change in the judicial attitude toward the doctor. In recent years the doctrine of *res ipsa loquitur* has been applied in many cases and in many states—and the indications are that there is a definite trend toward broadening its use.

Other Modern Trends

While it would appear that the leading position must be conceded to California, courts in other states are also showing increased dexterity in devising ways and means of expanding the doctors' liability in medical malpractice cases. One of the favored fields for this approach is the lifting of the bar of the statute of limitations —particularly in cases involving the failure to remove certain personal property in a surgical case. While the gist of the action is malpractice, and that should normally be described as an act or omission on the day of the treatment or surgery, in many states the act complained about does not come into being until the object is discovered. Also, it readily becomes a "fraud" —the doctor is charged with intentionally concealing that which he did not know—and then is subject to the longer statutory period.

Another trend relates to the requirement that the malpractice be established by affirmative competent testimony, through a qualified, licensed physician in the same state, who is required to be familiar with the practice in the particular area and the specialty involved. The difficulty in obtaining such evidence expanded the rule to the extent that out of state doctors could be called under certain circumstances. Later, this was further expanded—in Wisconsin—*Morrill v. Komasinski et al.*, 256 Wis. 417; 41 N.W.2d 620 (1950)—by permitting a Michigan osteopath to second-guess an orthopedist. This opens an entire new field, available to medical malpractice claimants, and the past relationship between the two schools of medicine has been such that issues of fact for juries will be increased. (In the *Morrill* case the jury accepted the testimony of the osteopath in preference to the testimony of four outstanding orthopedists, two of whom taught the subject in Wisconsin's two medical schools).

Still another trend is found in the doctrine of charging the attending physician or surgeon with responsibility for the acts of others—those in the employ of the hospital. An example of this is found in the case of *McConnell v. Williams*, 65 A.2d 243, (Pa., 1949), in which an interne improperly applied a solution of silver nitrate to the eyes of a new-born infant, which resulted in the loss of one eye. The court recognized that it was customary to delegate such details to assistants—in fact, to the hospital nurses—but the attending physician was held responsible to the plaintiff.

Many other services are customarily rendered by hospital selected assistants. Keeping in mind the practical operation of a hospital and the limited participation permitted to the average surgeon or physician in the management of hospitals, it leaves even the most qualified doctor without any real protection.[2]

There are other ways and means of expanding liability generally in medical malpractice cases; some have been employed and, considering the trend, it should not be difficult to predict that others will be found.[2]

A good deal more could be said in regard to the entire subject—expanding the doctor's liability—but it is felt that we have covered enough of the ground to justify our original statement that something must be done to reverse the trend, if possible. It is suggested that a good deal could be accomplished if we would meet with our local medical groups and point out some of the recognized factors which lead to claims.

Some Factors Which Lead To Medical Malpractice Claims

1. Loose remarks as well as direct criticism, by succeeding physicians.
2. Notations made on hospital records by internes. (Ill founded opinions or diagnoses).
3. Instituting suit for collection of the doctor's bill prior to the expiration of the statutory period within which to bring a medical malpractice suit.
4. A hostile attitude created by requiring a patient to sit in a waiting room for a long period of time.
5. Failure to respond "promptly" to emergency calls.
6. Information imparted or statements made to the patient by the attending nurse.
   (a) Special precautions are necessary in those cases in which a nurse is included among a patient's relatives.
7. The giving of privileged information on oral approval. (In some cases, in which the information was not as favorable to the patient as desired, an issue of fact was raised as to whether the doctor had such approval).
8. Failure to freely use x-ray for diagnostic and check-up purposes.
9. Failure to take a complete history which, if taken, would have disclosed reasons why certain procedures should not have been followed.
10. Disclosure of the fact of malpractice insurance coverage.

[1]Mr. C. Joseph Stetler, Director, Law Department, American Medical Association, feels that this doctrine is particularly unfair to doctors.

[2]While to a lesser degree—for the present—there is a definite trend in the same direction in connection with cases against hospitals. An example of that fact is found in two cases recently sent to us by Mr. Lewis C. Ryan: *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92 held that hospital was immune from liability where patient was injured as result of a medical act. In a recent case, *Becker v. City of New York*, 2 N.Y.2d 226, Mr. Ryan points out, the court has lost its enthusiasm for the rule laid down in the *Schloendorff* case.

11. In general, the erroneous assumption on the part of the doctor that the old-fashioned relationship between patient and physician still exists.
12. Failure to obtain written approval to have operation performed by another doctor.
13. The making of predictions which are too optimistic.
14. Failure to confirm instructions in writing—when disregarded to the knowledge of the physician; or, in any event, when serious consequences will follow if instructions are not carried out.
15. Errors in the filling of prescriptions when telephoned to the druggist.
16. Failure to promptly adequately follow up indications of dissatisfaction with the physician's services. (Sometimes a frank discussion affords an opportunity to correct mistaken ideas before they grow into actions).
17. Failure to arrive at an understanding in advance, particularly when substantial fees are anticipated.
18. Leaving the city without advance notice to a patient in need of continued care without securing in advance a substitute acceptable to the patient, or in the alternative permitting the patient to select the substitute.
19. Withholding material facts from a patient who is suffering from a serious ailment. (While there are good reasons why it is done in some cases, the physician does not have the right to withhold such information).

Additional Subjects for Discussion

The recovery room has proven to be very valuable. Its location, on the same floor, near the operating room, with oxygen tanks and other necessary equipment and trained personnel, provides better care and eliminates some of the dangers and occurrences which have taken place in the past under the old arrangement when a patient was wheeled back to his room directly from the operating table, in a semi-conscious condition. However, apparently not all hospitals are equipped with recovery rooms at this time. It is conceivable that since its value has been demonstrated, the failure to provide a recovery room in a given case may be the basis for a claim.

Surgical sponges are impregnated with radio-opaque material and this frequently aids in discovering the cause of post-operative complaints which continue for an excessive period. However, if it is possible to take x-rays before a cavity is closed, would it not be of even more value, and would not this tend to eliminate one of the major sources of medical malpractice claims?

Would not an insurance company be justified in making the above two procedures—and possibly others—a condition of coverage?

While it is not a cause—at least directly—for malpractice claims, the failure to keep adequate records often unnecessarily injects issues of fact for a jury. Some ordinary, routine developments are—or may become—important later on. The failure to keep records creates an atmosphere of suspicion, invites contradictory statements from claimants, and tends to add to the problems already presented. In the absence of records, the doctor's word in regard to certain issues, is no different or better than the claimant's—in the eyes of a jury. To the extent that the failure to keep adequate records assists in bringing about an adverse result for the doctor, it is a factor in the pressing of subsequent claims, because claimants and their attorneys are encouraged thereby.

Conclusion

It is felt that local medical meetings present the best opportunity to discuss the subject with doctors. They are—or should be—keenly interested.

And such a meeting may also present a good opportunity to discuss with doctors their duty and obligation to the court and to a former patient, when the doctor is served with a subpoena, by the patient's attorney, to appear in court to testify in behalf of the former patient. Some plaintiff's attorneys make it a practice of resorting to a subpoena—and the statutory witness fee—in "arranging" for the testimony of the original attending physician —usually in cases in which the original attending physician does not agree with plaintiff's claims. He nevertheless is required to call the former attending physician and have him testify concerning findings and early treatment—in order to lay a foundation for the testimony of his principal medical witness—a physician selected by the attorney.

Many doctors are not aware of their obligation when served with such a subpoena. They are irritated because of the time involved and the fee paid. Under such circumstances they make a very bad impression upon the court and the jury, to say nothing of supplying plaintiff's attorney with a perfect opportunity to convert the doctor's attitude and conduct to plaintiff's advantage in the case.

Brain and Spinal Cord Injuries Related to Trauma*

HAMLET J. BARRY, JR., Chairman, *Denver, Colorado*
FRANCIS CARROLL, *San Francisco, California*
HARLEY J. MCNEAL, *Cleveland, Ohio*

A REVIEW of statistics over a period of years leads to the conclusions that the automobile causes about 15% of the accidental injuries in the United States, whereas industry accounts for approximately 22% of such cases. With increasing use of machines, the farming industry produces more accidental deaths than any other industry. Home accidents account for almost 50% of the total of all accidents.

Singularly, approximately 80% of the accidental death cases are reported as head injury cases. The figures also indicate that for every fatal head injury, there are about five cases which are non-fatal serious head injury cases resulting in permanent partial disability.

Thus, a discussion of some phases of trauma to the head is timely, to focus attention upon a subject occupying a major portion of the personal injury trial lawyers' working day.

Head injuries involving injury to the brain cause many changes in the individual involved, among which could be:

Dizziness
Psychosis
Psychoneurosis
Hysteria
Change in personality
Diabetes insipidus
Cushing ulcer
Loss of smell
Loss of taste
Hydrocephalus
Headache
Sleeplessness
Mental retardation
Paralysis
Epilepsy
Adiposis genitalis
Aphasia
Disturbances of vision
Deafness
Delayed apoplexy

A brief outline of the anatomy of the head is necessary at this point. Working from the skin covering the skull to the brain substance, we find the subcutaneous tissue immediately underneath the skin, then the bony cage that we know as the skull, the epi-dural space and then the three membranes covering the brain known as the meninges of the brain. The outermost membrane is called the dura mater, and immediately underneath, we find the sub-dural space. Next to the sub-dural space is the thin membrane known as the arachnoid mater. Below this membrane is the sub-arachnoid space, and finally the membrane immediately over the brain substance called the pia mater.

Trauma to the head comes as a result of concussion, contusions, abrasions, lacerations and fractures which may be simple, compound or comminuted in character, or a combination of the compound and comminuted types. The reaction to injury is demonstrated as a swelling, hemorrhage, increase of blood supply, transudation and exudation, clotting or fibrosis.

In order to arrive at a determination of brain damage, the plaintiff should be required to give evidence of definite injury to the nervous system. Questions bringing out evidence on absence of reflexes, visual defects, unconsciousness, blood in cerebrospinal fluid, hematomas (blood clots), convulsions, discoloration behind the ear, immediate black eye, bleeding from nose, eyes or ears, projectile vomiting, dizzy spells, fainting, amnesia, are all important

*Prepared by a subcommittee of the Casualty Insurance Committee.

and help prove or disprove brain damage.

It is important to know the age and sex of the injured party. Further, it must definitely be ascertained if the person is right or left handed so diagnosis of the extent of injury may be accurate, since the left side of the brain controls the right side of the body and vice versa. Also, the period of unconsciousness is important to learn. Generally, the length of time the patient is unconscious serves as an aid in determining the seriousness of the head injury. But, particular inquiry has to be made so as to arrive at an accurate appraisal of the unconsciousness as distinguished from exhaustion, semi-consciousness or an irrational period. A danger sign to watch for is unconsciousness followed by consciousness lapsing into deep unconsciousness indicating hemorrhage.

It is also important to learn the amount of alcohol present. What might first appear to be a case of excessive use of alcohol, could actually prove to be a serious head injury case.

Inquiry also must be made as to whether the injured person has been administered drugs. In most cases, morphine sulfate is not indicated as it deepens coma and lessens breathing as well as constricting the pupils of the eyes.

A cerebral contusion concerns itself with a bruising condition. In this connection, the portion of the brain injured swells and sometimes causes an impairment in the injured party's vision, speech or movement. If the impairment does not improve in about 7 or 8 weeks, then we should conclude there has been a large hemorrhage or laceration of the brain which will eventually produce scar tissue accompanied with a permanent impairment of function.

A laceration means a definite cutting or tearing of the brain with accompanying hemorrhage of blood vessels. In most cases, a laceration brings about permanent damage to the brain.

Injuries to the blood vessels of the brain sometimes cause blood clots which press on a brain area and cause unconsciousness or impairment of function. Sometimes a laceration results in only a temporary condition so that the plaintiff's medical witness should be questioned about the location of the injury to test whether or not the claimed impairment could result from the injury. Also, the medical witness should be questioned closely as to his diagnosis and treatment of the alleged head injury. Then finally, the witness should be interrogated about the mechanisms of head injury.

Many times the accident causes force to be applied to the body elsewhere than on the head. This force, in turn, may be transmitted to the head through the spine.

In some cases, it can be determined whether or not the injuries claimed could have resulted from the particular type of force applied and resulting from the accident.

Because there is only a limited area of fat and muscle under the scalp there is not much cushion for a blow to the head. But, because the skull is rounded, the force of the impact is usually deflected and we see a stretching and tearing of the scalp in some of the accident cases. These tears and cuts usually occur at right angles to the direction of the blow or force.

It has been found that bone is more likely to fracture from traction than by compression. When external force is applied, we find the outer layers surrounding the bone compressing and the inner layer of bone stretching to the extent of fracturing. When several cracks in the bone are found probably minute multiple forces have been applied.

Whether a bone fractures at the site of the impact or away therefrom depends upon the speed at which the collision occurs and the individual strength of the bone. If the area where the force of the impact has been applied is somewhat elastic and the force is expended slowly enough, the area of fracture will appear at the site of the weakest area of bone.

A frontal blow usually causes a fracture at or near the point of impact; and then it is transmitted on through the floor of the skull, because the bones of the floor of the skull are relatively heavy. The bones of the side and top of the skull are correspondingly elastic and thin. Thus, the bones of the floor of the skull are more susceptible to fracture.

Blows received on the top of the head or falls upon the buttocks usually cause fractures of the ovoid plate where the floor of the skull is attached to the spinal column. This type of force may be transmitted to the temporal bones of the skull to form a circular fracture of the skull.

The dura mater, which, as you will remember, is the thick membrane attached to the inner surface of the skull and con-

tains a number of arteries and veins. If the dura mater is penetrated, there is a good chance infection or adhesions between the skull and brain will result. If there is laceration of the dura mater at the point of the venous sinuses where the blood is collected as it leaves the brain, or along the middle meningeal artery, large blood clots may result between the dura and the arachnoid or between the dura and the skull.

A bleeding of the dura may occur even though there is no apparent damage done because of the many veins contained therein. This bleeding often occurs in the region of the temporal lobes of the brain.

If the thin arachnoid membrane is also torn, cerebrospinal fluid probably will flow into the space below the dura and mix with blood. Conversely, there will be seen evidence of blood in the cerebrospinal fluid.

If both the arachnoid and dura are torn, dense adhesions known as scar tissue probably will form tending to bring about epilepsy.

As you know, old persons and chronic alcoholics are very susceptible to head injuries. Hemorrhages of the brain in these individuals may result from very slight impacts.

Descriptions of contrecoup injuries to the head have been made since the days of the Greeks, but like the weather nobody did anything about it. Of late, however, more attention has been given to this phenomena. C. F. Rowbotham in his book on Acute Injuries of the Head describes the mechanics of this kind of injury as follows:

"It has often been stated that damage to the brain can occur by contrecoup, but what is meant by this mode of injury has never been made very clear. Usually the term (injury by contrecoup) is used purely in the sense that a pole of the brain opposite to the site of impact has been damaged and does not indicate the particular physics by which the injury was produced.

"This limited implication of the term is probably the correct one, as cerebral lesions of a contrecoup distribution can readily be explained by one or other of the above mechanisms, and they are produced in four ways:—

(a) By the shearing forces of rotation.

(b) By suction, either when the brain is flung from the skull when the motion of the head is abruptly arrested against a resistance, or in distortions of the skull.

(c) By the brain being struck by a distant area of the skull as it is flattened in a deformation.

(d) By the brain being thrust against a dural septum or face of the skull when its opposite side is struck by a local inbending of bone — linear acceleration."

From the contrecoup type of injury, we are naturally led to a discussion of the subject of concussion of the brain.

The application of pressure or a blow to the head when it is fixed or rigidly held causes a compression concussion which is usually mild in character. Contrary-wise, serious injury can result from an acceleration concussion which occurs when the head is suddenly accelerated or decelerated rapidly, such as the head being propelled against a stationary object without warning.

Cyril B. Courville in his book Commotio Cerebri has defined concussion as "a direct effect of violence on the nerve cells of the brain resulting in temporary depression or cessation of cerebral function without immediate detectable evidence of structural change in these cells. The residual symptoms are to be accounted for by a disturbance in the vasomotor mechanism which persists for a variable time thereafter." (From Page 83)

Courville further sets out the various degrees of concussion as follows:

"The mildest form (first degree) of concussion consists of transitory motor weakness, dizziness or blurring of vision, but without impairment of consciousness (Macleod, 1862). Second degree concussion includes those instances in which individuals are only dazed or stunned after injury to the head but do not lose complete contact with their surroundings (Pott, 1773; Abernethy, 1810). The next group (third degree) includes those individuals who recover promptly (within the hour) after traumatic loss of consciousness (Gussenbauer, 1880). The fourth degree of concussion includes those who recover from the unconscious state more slowly, usually within two to six hours, which is too short an interval to be associated with physical damage (contusion) to the brain. The next level (fifth degree) implies a sufficiently long period (over six hours) to suggest the possibility of cerebral contusion or cerebral edema as responsible in part for the patient's symptoms. In these instances, the

problem involves a more severe degree of concussion plus physical damage to the brain, both contributing to the duration of the unconscious state. Concussion of the sixth degree is found in a group of individuals who are destined to die of their cranial injury but linger on for a variable interval of time (Magner, 1947). Physical violence evidently sets up a dysfunction in the vital centers which is too profound to be corrected. The most severe degree (seventh) of concussion is that which destroys the patient outright, without any evidence of significant physical damage to the brain (Littre, 1705; Hutchinson, 1875; Jefferson, 1933, etc.)."

Many symptoms are apparent after the immediate effects of a concussion are controlled, depending on the nature and extent of the trauma and the individual involved.

Much has been written about petechial hemorrhages occurring after concussion. These hemorrhages should be of general distribution, or in the walls of the third or fourth ventricles to be considered as the results of a concussion. Generally, however, it can be said that these small hemorrhages do not cause significant disability and are gradually absorbed without permanent damage resulting from such hemorrhages.

The post concussion syndrome usually produces dull aching or shooting, sharp pains of headache. These headaches may be brought about by fatigue, exposure to sun, postural changes, use of alcohol, physical effort, psychological changes, or they may precipitate from no known causes.

Some of the injured complain of uncertainty in moving about, or of having a light-headed feeling akin to dizziness. Nystagmus may be present for a short period upon a change of position. Here too, physical effort, alcohol, or exposure to sun, causes the symptoms to become more pronounced indicating a vasomotor instability.

Nervousness and visual disturbances are rather common complaints of post concussion states. The psychogenic symptoms — irritability, anxiety, fear, mental confusion, emotional instability, impatience, restlessness, sleeplessness, absentmindedness and the like are slow to improve and require constant attention. Visual complaints consist of blurred vision periods accompanied sometimes with headache, or brought about as a result of physical exertion.

Many of these cases also relate a feeling of being tired early after injury, but also they demonstrate a rather rapid recovery from this symptom as time goes on.

On the question of post traumatic neuroses, Courville in Commotio Cerebri at pp. 105-106 has this to say:

"1. It is generally agreed that there is no specific type of post-traumatic neurosis. Any neurosis developing after cranial injury is simply one of the usual types of neuroses which has been precipitated by the injury as the exciting factor (Strauss and Savitsky, 1934a; Hall and MacKay, 1934; Wechsler, 1935; Schaller, 1939).

"2. A patient who develops a neurosis after injury to the head is one who already has the basic requisites for such a neurosis. Such constitutional factors will become evident when the patient's background is studied (Hall and MacKay, 1934). These 'pretraumatic factors' (Minkowski, 1931) are simply precipitated into a neurosis by the injury.

"3. The common types of neurosis which are prone to occur after concussion are: (a) hysteria, which has been interpreted in some instances at least as the individual's 'primitive response to resentment' of mistreatment of his case (Strauss and Savitsky, 1934 a, b); (b) anxiety neurosis, which is a response of fear as to the outcome of the injury received (Schaller, 1939); (c) 'terror neurosis' (Shreckneurose), resulting from a psychological shock from the traumatic situation (Horn, 1916); and (d) neurasthenia and hypochondriasis, which are but the accentuation of certain postconcussional tendencies (Schilder, 1943). Any one of these types may be combined with elements of the true postconcussion syndrome.

"4. The symptoms of a traumatic neurosis differ distinctly from those of the postconcussion syndrome, for the former state is characterized by a mental alertness, emotional depression, exaggeration of pre-existing personality defects, the elaboration of symptoms both in statement and behavior, the presence of hysterical components, and the multiplicity, changeability and indefiniteness of the symptoms (Schaller, 1939).

"5. Post-traumatic neurosis should not be confused with compensation neurosis (for it may be found as well after non-compensable injuries), nor with malingering, which is a conscious and planned effort to defraud.

"6. The patient who has sustained a true concussion of the brain may also develop a neurosis (Strauss and Savitsky, 1934[a]). The fact that in concussion there are a number of psychic manifestations which result from a disordered vasomotor control and its effect on the cerebral hemispheres makes it difficult at times to separate the two. However, a critical examination of the individual symptoms and the patient's background will serve to distinguish between them. Such a possibility should be considered when all therapeutic measures fail and when symptoms are unduly prolonged after relatively minor degrees of concussion.

"7. Treatment is usually effective with recovery to be expected well within a year (Schaller, 1918), but should be begun early, with a definite program of therapy in mind, and consistently carried out (Hall and MacKay, 1934)."

Many of the symptoms described are subjective in nature, but there are certain objective factors which can be considered in proving or disproving this condition, such as demonstrable changes in the eyes —size of pupil, difficulty of convergence and lateral gaze, together with nystagmus and fullness of retinal arteries. Changes in blood pressure, pulse rate, depression of deep reflexes together with complaints of ear difficulties are of importance in considering relationship of injury to the trauma. Also, an increase in the protein content of the cerebrospinal fluid is fairly accurate proof indicating brain damage after concussion. The use of regular repeat electroencephalograms is also recommended to demonstrate the presence or absence of a generalized slow activity (delta rhythm) immediately after injury. If the slow waves are present immediately after injury and disappear after a relatively short period, we can say there has been brain disturbance caused by the concussion. The Babinski and Romberg tests also are important diagnostic aids in proving or disproving injury.

On the question of prognosis, most physicians agree concussion is transient and that recovery can be predicted in most cases. This is true because concussion is usually a relatively temporary state brought about as a result of a breakdown in the function of the brain and the blood supply of the brain due in most cases to trauma to the head. Courville in Commotio Cerebri in discussing cerebral concussion prognosis makes the following observations:

"Yet any of those who have had considerable experience in this field know that a small number do not seem to recover fully but continue to complain of headaches, dizziness and nervous symptoms. It is difficult to ascertain the exact percentage of patients presenting the post-concussion syndrome who fail to make a complete recovery. Some observers have concluded that the symptoms of concussion should not linger for more than three months (Fay, 1935; Munro, 1939[b]). Russell (1932) found that of a group of patients who had been unconscious for an hour or less, 28 per cent were still disabled at the end of six months. A further report by this investigator (Russell, 1934) noted that of forty-one patients unconscious for less than an hour, 90 per cent had returned to work in six months while 5 per cent were still disabled at the end of eighteen months. Of thirty-three patients who remained unconscious up to twenty-four hours (which figure must almost certainly have contained a number of individuals with contusions as well as concussion), 84.6 per cent had returned to work in six months while 7.7 per cent remained disabled at the end of eighteen months. In cases of war injuries (in which concussion was relatively mild but usually associated with physical injuries to the brain), those with permanent residuals and disability ran as high as 23 per cent (Symonds, 1942). In general, it is concluded that the likelihood of permanent disability increases with the duration of the period of unconsciousness (Russell and Nathan, 1946).

"In his study on the prognosis of craniocerebral injury (including pure cases of concussion), Russell (1934) came to the conclusion that compensation tends to increase the period of disability, for the period of recovery was longer among compensation groups than in non-compensated ones. With this conclusion Symonds (1936) was in essential agreement. Since in these groups, observed for a limited period, com-

pensation neurosis and malingering probably color these figures, all must agree that such is probably the case. But if concussion is really a self-limited state and (with some exceptions) ultimately results in recovery, and because even postconcussion neuroses are likewise prone to recovery, the final prognosis in the two groups would probably be very much the same. This seems to be substantiated by the findings of Cedermark (1942) and of Ladame (1948) who found that after an interval of three years or more there is no difference in the disability percentages in insured and non-insured individuals who have sustained craniocerebral injuries."

Passing from the discussion of the phenomena of concussion, we come to consider the problems arising from traumatic intracranial hemorrhage.

As pointed out, the intracranial hemorrhages concern the meninges and the cerebrum. The particular hemorrhage is usually classified as an extradural, subdural or subarachnoid hemorrhage. The extradural and subdural hemorrhages usually require surgery, because after trauma, blood sometimes collects in these areas beneath the skull in large quantities and progressively compresses the cerebrum, ultimately causing death unless this pressure is relieved. The subarachnoid hemorrhage occurs in the subarachnoid space where absorption usually occurs, thus eliminating the necessity of surgery in most cases.

In dealing with an extradural hemorrhage, careful inquiry has to be made regarding the period of unconsciousness and whether the injured had a period of consciousness following, at which time the person seemed oriented, followed by deep coma after the conscious period. This sequence of events is one of the main signs of the existence of an extradural hematoma. Usually there is vomiting, headache and progressive drowsiness following the conscious interval also. These massive hematomas outside the dura mater may very well develop even after a relatively slight trauma to the skull, so that the physician must be very circumspect in his inquiries as to signs and symptoms following any head injury.

X-rays are helpful in detecting fractures over the longitudinal sinus, transverse sinus or middle meningeal artery of the head because it is in these areas that the extradural hematoma usually develops.

Another diagnostic lead is the presence of a dilated pupil on the side of the hemorrhage. This also could indicate the condition is present more toward the base of the skull. A weakness or paralysis on the side opposite the dilated pupil also suggests the presence of the extradural hemorrhage. Angiography has been used with some success in pin pointing this kind of hematoma.

A fracture at the back or occipital region of the head could cause a hemorrhage of the lateral sinus with no definite signs of such a hemorrhage. Even an examination of the spinal fluid could be negative in this instance, so that a close watch must be kept over the patient suffering an occipital injury to detect increasing drowsiness and coma which warn of the hemorrhage occurring in the posterior fossa. Lumbar puncture should be avoided because a "herniation of the cerebellar tonsils through the foramen magnum with acute medullary compression will cause death" says Dr. Richard C. Schneider in Correlative Surgery. He also writes, "The patient with a cerebrospinal rhinorrea or otorrhea may decompress himself intracranially by constant drainage thereby permitting expansion of an extradural hematoma without evidence of increased intracranial pressure, changes in vital signs or alterations in the state of consciousness." Correlative Surgery, Chap. 20 at page 295.

This type of hematoma will develop from a ruptured artery in about 12-15 hours, whereas a ruptured vein or dural sinus tear will not develop this kind of hematoma for from about one to four weeks.

The subdural hematoma is nearly always the result of trauma. The size of the hemorrhage determines whether it is to be characterized as acute, subacute or chronic. Immediate signs and symptoms similar to those warning of the presence of an extradural hematoma are present in the case of an acute subdural hemorrhage. The earlier compression signs of a subdural hematoma are observable, the more serious is the condition. If the hemorrhage develops in twelve hours or less the result is usually fatal.

The development of a subdural hematoma within ten days to two weeks after trauma is usually classed as a subacute type.

A symptomless patient carrying on work for a period of about a month after injury before giving signs of a developing

hemorrhage is classed as having a chronic subdural hematoma.

The subdural hematoma usually develops from tears of the cortical veins and veins on the surface of the brain to the dura mater, or entering the sagittal sinus from the surface of the brain. Cerebrospinal fluid and tissue fluids go through the arachnoid membrane into the subdural space and gradually a pressure is built up until diagnostic signs develop. The under side of the dura becomes thick and a membrane forms around the hemorrhage. The membrane contains blood vessels which can bleed into the subdural space. Likewise, an epithelial lining grows over the arachnoid membrane so the hematoma is enclosed within a tough lining under the dura mater and a thin epithelial lining over the arachnoid. This type of hematoma usually is found in the frontal and parieto temporal regions of the brain according to Gurdjian and Webster in their book on Operative Neurosurgery at page 204.

The diagnostic signs of this type of hemorrhage are severe headache, nausea, vomiting, convulsions, blurred or double vision, aphasia, dilated pupil on side of hematoma, personality changes and hemiparesis. There will also be evidence of intracranial pressure by elevation of blood pressure and bradycardia. An x-ray may show a calcified pineal gland displaced to the opposite side of the lesion. Many times the cerebrospinal fluid will be colorless in those cases in which a lumbar puncture may be done with safety. Also, the injured person may have a massive clot and still have a normal cerebrospinal pressure, so particular attention must be given to progressive neurological signs accompanied by lethargy. An electroencephalogram will probably show a slowing of the delta waves.

The subarachnoid hemorrhage occurs more often than any other type. The bleeding arises usually from the cortical veins and the veins going to the sinuses. Tears of the orbital surfaces of the frontal and temporal lobes probably account for this type of hemorrhage.

With this type of hemorrhage the injured person is subject to headache, elevated temperature, back discomfort and positive neurological disturbances. The cerebrospinal fluid is bloody in these cases so that the hemorrhage is easily detected upon lumbar puncture.

As has been stated, this type of hemorrhage is usually absorbed so there is no need for surgical intervention.

We also might find a combination of small subcortical hemorrhages resulting over the frontal and temporal lobes where the brain rides on the bony ridges of the anterior and middle fossae and when the brain is thrown against the sphenoid ridge as a result of trauma.

If these hemorrhages described occur near the motor areas of the brain we find definite neurological signs among which could be a gradual paresis of the arms or legs or of the face. If the hemorrhage is on the surface of the brain with irritation of the cortex, one would expect scar tissue to develop with consequent experiencing of Jacksonian epilepsy.

Hemorrhage of the posterior fossa is difficult to diagnose. Thus, particular attention is given cases where there has been a tearing of the scalp in the occipital region, or a fracture over the transverse sinus.

In the intracerebellar hematoma cases the patients run from consciousness and slight headache without neurological signs to severe headache, projectile vomiting and coma.

Contrecoup injuries bring about intracerebellar hemorrhages where the posterior fossa is disturbed.

Finally, one must consider cerebral swelling and edema in any discussion of brain injuries. Cerebral swelling is due to a swelling of the nerve fibers and myelin sheaths as well as the glia of the brain. The swelling progresses to the edema stage with distention of the perivascular and pericellular spaces so that the fluid mixes with the substance of the brain causing necrosis and liquefaction of the brain tissues. The cerebral tissue swelling causes an increase in venous pressure with an accumulation of carbon dioxide and eventual death.

In view of what has been written here, it can be demonstrated that any closed head injury must be given immediate and close attention to detect any lesions that may develop such as have been described here.

All diagnostic aids including ventriculography and arteriography should be used to detect any pathological conditions. Of course, procedures involving ventriculography and arteriography must be done carefully and only after other diagnostic

aids have been used and found negative insofar as diagnosis is concerned.

However, many closed head injury cases which were considered hopeless years ago are now treated successfully and go on to relatively good recovery as a result of the rapid strides medicine has taken in discovering new techniques to the lasting benefit of mankind. With the increase of medical knowledge, which has been generously imparted to trial lawyers by competent physicians and surgeons, personal injury litigants have had their injuries presented, explained and explored more capably by both plaintiff and defense counsel to juries in the last few years. The end result of this education is that the deserving and injured plaintiff, as well as the malingerer, receives a more evenly balanced justice meted out by a jury which has received complete and detailed medical testimony on the cause and effect relationship of the injury to the trauma in the particular case.

SPINAL CORD INJURIES

The spinal cord, sometimes thought of as an elongated extension of the brain, contains nerve fibers and nerve cells. It is about one half inch in diameter and about eighteen inches long, ending between the first and second lumbar vertebrae.

The cord is suspended in the spinal canal by ligaments extending out from each vertebra, constantly bathed in the cerebrospinal fluid contained in the subarachnoid space.

Because it is so well protected by cerebrospinal fluid and the membranes that cover it and fits so loosely in the bony spinal canal, the cord often escapes injury in vertebral fractures and dislocations. It is proposed here to glance at some aspects of those injuries to the cord which do occur and to examine some of their practical effects upon the insurance industry.

Relationship To Bony Injury

Most severe bony vertebral injuries are accompanied by damage to the nervous structures. It is sometimes overlooked, however, that damage to the spinal cord is not of necessity associated with demonstrable bony injury. There is, in fact, no constant relationship.

Thus, on the one hand, there may be a cervical fracture dislocation with impingement on the neural canal and yet no spinal-cord damage. Conversely, immediate total and permanent paraplegia or quadriplegia may result from an injury, although no spinal abnormality can be radiographed.

Mechanism of Injury

Most spinal-cord injuries in civil life result from falls, automobile accidents or direct trauma from falling objects.

Vertebral injuries may cause cord damage in various ways. In crushing fractures, fracture dislocations, dislocations of the spine or fractures of the laminae, the spinal cord may be contused, cut or completely severed. Fractures may impinge on the cord directly. With compression fractures, often at twelfth thoracic and first lumbar vertebrae levels, the cord may be damaged by acute angulation or pressure of the bone fragments. Temporary displacements of the vertebrae can cause cord damage. After crushing or bruising the cord the vertebrae may snap back to nearly normal position leaving no apparent cause or reason for the cord damage that has been caused.

Dislocations of the spine may result in cord damage because of the angulation of the vertebral canal.

Acute protrusion of an intervertebral disc may also damage the cord.

Types of Cord Injury

However caused, spinal-cord injuries can be broadly classified in this manner:

1. *Concussion.* This, like concussion of the brain, involves a temporary interruption of spinal-cord function with subsequent complete recovery.

2. *Contusion,* a bruising of the cord, the results of which, depending upon its severity, may range from slight residual reflex changes to paraplegia.

3. *Laceration,* a cutting or tearing of the cord. The outcome here is dependent upon the percentage of the cross-sectional area of the cord that is lacerated and the extent of damage to adjacent cord area. There is a permanent loss of function of all tracts involved in the laceration, there being no regeneration of the nervous tissue within the spinal cord.

4. *Hemorrhage* within the cord, or without, compressing the cord.

Cervical Cord Lesions

These are the most serious because they cause the most extensive loss of neurological function.

Actual severance of the cord above the fifth cervical segment is generally fatal. At lower levels, quadriplegia results with the degree of paralysis of the arms varying with the level of the lesion.

Thoracic Cord Lesions

Cutting of the cord in this area results in paraplegia with loss of bowel and bladder control. The upper extremities are spared. Spinal cord injuries here often result from gross fracture, dislocation and complete cord severance. These, surgery cannot help.

Where the cord is compressed by crushing of the lamina or pedicles, relief can be obtained by early laminectomy and decompression.

Lumbar Lesions

The spinal cord ends in the cauda equina, so called because of its horse's tail-like termination. The lumbar and sacral nerve roots comprising it may be injured in fractures below the second lumbar vertebra. Varying degrees of paralysis and sensory loss occur with such injuries, depending upon the extent of the damage and the level of injury. Often the ability to walk with braces is retained. Loss of bowel and bladder control is common even where there are minor degrees of paralysis and sensory loss. This results from the fact that the second, third and fourth sacral nerve roots are of utmost importance in bladder and bowel control.

In cauda equinia lesions secondary to trauma laminectomy is indicated in most cases because of a potential for regeneration of cauda equinia roots.

Financial Impact From Cord Injuries

Today, great financial impact results from spinal cord injuries. Judgments rendered range from $100,000 to $300,000. We are told that one reinsurance company on a compensation case is carrying a reserve of $400,000 in the instance of one quadriplegic.

The fact that those who sustain spinal cord injuries survive at all is new. In World War I, 20% of the soldiers incurring spinal cord injuries reached the U. S., and 10% survived for a period of longer than a year, and in 1948 a mere 1% still survived. (Veterans Administration Technical Bulletin TB10-503, Pg. 2.)

In contrast to the statistics of World War I, in World War II, 80% to 88% survived to return from the theatre of operations, and of those returning to paraplegic centers there was a mortality rate of only 2% to 8%. (Veterans Administration Technical Bulletin TB10-503, Pg. 3.)

Obviously, death is no longer the only probable consequence of spinal injuries, and undoubtedly the continued existence of those so injured has increased the great financial loss. Although there are no actuarial figures available as to the life expectancies of the spinal injured, it is currently believed that many so injured live out their life expectancy. (Chap. 8, "Treatment of Injuries To The Nervous System", Donald Munro, M.D., F.A.C.S. Published by W. B. Saunders Company, 1952.)

Spinal injury does no longer augur the early demise of the injured, nor need the injured live out his life expectancy as a mere vegetable.

It is therefore suggested that the dollar value of such an injury can be reduced if defense counsel can, either during trial or during settlement negotiations, inject a full consideration of rehabilitation and its consequent savings in medical and nursing costs as well as savings in loss of earnings.

It is submitted that the general "rule of law which requires one who is injured by the negligence of another to exercise reasonable care to avoid loss or to minimize the consequences of such injury", (15 Am. Jur. 434, Sec. 36), might be broad enough to apply to those who have sustained spinal injury. Similarly, evidence as to the probability of successful rehabilitation in a specific case where rehabilitation has been refused is a proper method of showing actual damages sustained. (15 Am. Jur. 438, Sec. 39.)

There is apparently a direct connection between the amount or degree of rehabilitation obtainable, both physically and mentally, to the place of injury in the spinal cord. The lower the injury in the spinal area, the better the rehabilitation result. (Veterans Administration Technical Bulletin TB10-503, Pg. 38.)

The Liberty Mutual Insurance Company has done outstanding work in the rehabilitation of the spinal injured. In September, 1956, it reported a total of 172 spinal cord injury cases, (130 paraplegics, 42 quadriplegics) of the total of which 28 died leaving 144 disability cases. In 102 cases rehabilitation has been undertaken, 43% of which have returned to work or are engaged in business. (Medical Service,

published by Liberty Mutual Insurance Company, 25-26.)

Studies made by both Liberty Mutual Insurance Company and the Veterans Administration have conclusively shown to the writers that the amount of financial loss resulting from spinal injury can be materially reduced by early rehabilitation. In those instances where there is no attempt at rehabilitation, the medical expense can continue at a monthly rate of $500 to $600 throughout the life expectancy of the injured. Of course, where there is no attempt at rehabilitation there is the continuing wage loss throughout the injured's productive life. Modernly, rehabilitation can be undertaken for a cost of about $8,500 which covers a rehabilitation period of about 8 or 9 months. Thereafter the medical expense can be reduced to a sum averaging about $50 a month for life.

It is obvious from the foregoing information that when rehabilitation is properly undertaken, a considerable savings in future medical expense can be achieved.

In addition thereto, not only can there be a substantial savings in future medical expense, but many spinal injured can return to active employment. In 1948, the Veterans Administration reported that 29 spinal cases were earning sums ranging from $100 to $240 monthly with a mean of $148. (Vet. Adm. Tech. Bull. TB10-503, Pg. 38.) It is probably safe to assume that these same people are today earning additional sums in line with the general growth of the economy. In addition, the work tolerance of these same cases ranges from one to two hours a day, to fifteen to forty hours a week.

The Veterans Administration also reported that six out of 100 spinal injured cases had no inclination to work at all, which figure is apparently in line with the employable population of a normal community. (TB10-503, *supra.*)

Of course, the rehabilitation result in the case of any given injured is based upon the particular injury sustained, and of course is based upon all the qualities that make up his personality and work history. However, it would appear that through the proper use of medical testimony a qualified doctor could give an opinion as to the degree of rehabilitation that can be obtained in any given case.

Thus, the administration of justice in our courts improves over the years to the lasting credit of the medical and legal professions which have wisely and unselfishly joined hands for the purposes of cooperation and understanding, so that litigants can and will receive justice as the particular case warrants and deserves after a full and complete trial on all the issues, legal, factual and medical.

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Psychosomatic Problems Relating To Trauma*

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THE SUBJECT of this paper deals generally with the relations and reactions of our bodies and minds to our own individual personalities. To accurately appraise any given reaction involving psychosomatic illnesses, careful attention has to be given to diagnosis. Diagnosis in this field concerns both the mental and physical aspects of each individual case. In most cases, the psychological factors are found to be complex and necessitate careful disentanglement so that the importance of such factors can be properly brought into focus in relation to the physical illness concerned. Thus, a careful and searching examination must be given each patient to determine whether the physical or psychological illnesses in the individual case are dominant and whether physical or psychological attention is most needed from a medical standpoint.

Common varieties of psychoneuroses are anxiety neurosis, hysteria neurosis and "traumatic" neurosis. It is the latter condition that presents interesting challenges to the trial lawyer, the diagnostician and psychiatrist in the legal and medical fields.

The psychoneuroses are personality maladjustments and are not catalogued under physical ailments. Generally, the individual suffering from a neurosis reacts abnormally to physical stresses. Usually, a portion of the mind and personality involved runs from the reality of various day to day situations. In some cases, the total personality changes so that the individual lives in fancy and refuses any contact with realism.

Since this paper confines itself to psychosomatic problems involving trauma, the following paragraphs found in Walshe, Diseases of the Nervous System (6th Ed.) at page 324 are most interesting:—

"The different varieties of psychoneurosis show special modes of abnormal reaction to reality. Thus, the anxiety neurosis may be called a reaction by overaction. The patient develops morbid fears and then a number of psychological and physiological reactions expressive of and appropriate to those fears. The somatic symptoms thus consist of reactions resembling the normal physiological responses to fear, but differing from these in their intensity and their persistence. Tremor and tachycardia are examples of physiological reactions produced in this way, not primarily from disorder on the anatomical or physiological levels but psychologically caused. In hysteria, on the other hand, we have a reaction by loss of function; by underaction. This shows itself usually by some striking local loss of bodily function: a paralysis, an anaesthesia or a mutism, or in more profound cases by a splitting of the personality leading to fugues, amnesia, or to double personality.

"As has already been stated, the 'traumatic' neurosis partakes of the clinical characters of both the above-mentioned forms of psychoneurosis, but it is not traumatic in the strict sense of this word, for in peace time conditions it arises when in addition to trauma there exists the possibility of equating bodily injury with compensation. Injuries sustained in the seclusion of the domestic scene, in the cricket, football, or hunting fields, or at other forms of sport are not followed by traumatic neurosis, which is the sequel solely of road, rail, industrial, and other accidents in respect of which legislation has provided the possibility of monetary compensation. Trauma alone is incapable of causing neurosis."

*Prepared for the Casualty Insurance Committee, Harley J. McNeal, chairman.

Other medical text writers point out the complexities involved in this subject in some detail as is indicated herein below. Wechsler says in his "Textbook of Clinical Neurology" (7th edition), at page 710:

> "The relation of trauma to the nervous system presents many grave diagnostic problems, knotty medicolegal questions, and difficulties in medical management. Very often the relationship cannot be easily established and can merely be expressed as a matter of opinion. The ready suggestibility of most human beings, the difficulties in life from which trauma occasionally offers an easy escape, the bad management on the part of physicians and lawyers, the encouragement to litigation on almost everybody's part, the modern industrial organization and compensation provisions, all complicate every question of trauma to the nervous system. The legal difficulties are further increased by the general insistence on positive opinions which the honest neurologist cannot always give, and by the conflicting testimony of experts who take sides in doubtful cases. Finally, in many litigation cases the party liable for damages is as ready to underestimate the genuine complaints of the injured as the latter is prone to overestimate the extent of the disability."

McBride, in "Disability Evaluation", says at page 637:

> "When abnormal mental reactions occur following a blow on the head it is usually the belief of those concerned that the head injury was responsible. Damage suits and compensation claims frequently rest upon the balance of medical opinion to prove or disprove whether or not the trauma caused, precipitated, or aggravated the existence of a neurosis, or a psychosis. The threshold of tolerance to those factors producing a strain on the nervous system varies with the individual. His physical appearance, his personality and his daily activity, under stabilized conditions of social exchange, often do not reveal the inherent peculiarities and internal conflicts of a potentially neurotic or psychotic individual. A close history may show that his friends considered him to be hypersensitive and high-strung . . .
>
> "The differentiation of the pathologic state with permanent mental symptoms from the more or less temporary symptomatic neurosis or subconscious exaggeration requires thorough investigation and study of all phases of the case. Emotional speeches to the jury or an appeal for sympathy from compensation boards often are more effective on a jury than the conflicting testimony presented by doctors and others." P. 638.

Weiss and English, in "Psychosomatic Medicine" (2nd edition), page 8, says:

> "Neurosis has its own distinctive features to be discovered by psychosomatic study, for only in this way can serious errors in diagnosis and treatment be avoided."

Necessarily in view of the intangible complications, this discussion will exclude psychic injury without impact not compensable in New York State (*Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107), and will also exclude non-compensable injury from fright or shock due to witnessing injury or damage to persons or property other than the claimant. A complete annotation on this latter subject is found in 28 A.L.R. 2d. 1070.

Courts have permitted recovery even after a minimal impact. This is shown in *Comstock v. Wilson*, 257 N. Y. 231, where a plaintiff-passenger received slight impact from collision with defendant's automobile, fainted, and after she fainted, fell to the ground, causing a fractured skull.

> "The Courts in such case attempt no differentiation between the direct physical injury caused by the impact and the damage caused by the fright, even where the fright preceded the impact. The result may seem at times anomalous, for the direct physical injury may be insignificant in relation to the damages consequent upon the fright." P. 238.

Confirming the above text, in *Griffiths v. Shaffrey*, 308 N. Y. 729, an award in favor of an injured employee was affirmed where he suffered manic-depressive psychosis from slight impact, requiring confinement in the state hospital. A doctor for the employee testified to the causal relationship between the accident and the psychosis despite the argument of the employer's carrier that such causation was medically impossible. The court of appeals noted:

> "The expert called by the claimant agreed that the physical trauma of itself

could not cause a manic-depressive psychosis where he gave it as his opinion, well fortified by a reasoned analysis of the case, that the whole complex of psychic factors associated with the accident, including the claimant's worry about his narrow escape from death, his difficulty in adjusting to the hospitalization and to his return home, and the recurring nightmares recalling the circumstances of the accident, contributed to the precipitation of the breakdown. The causal connection between the accident and the psychosis was thus established by the testimony of an eminently qualified specialist which the board had the right to credit and accept."

Thus it is clear that a question of fact is presented when a doctor, whose qualifications are also for the jury, confirms the causal relationship. How can such medical testimony and so-called specialist qualifications (2 questions) be attacked by defendant's attorney?

As the text quotations show, a defendant's attorney is at a great disadvantage and cannot afford to cross-examine the plaintiff's specialist unless he has the plaintiff's complete past history. The other tool is knowledge of the so-called medical problems and literature involved as a basis for the cross-examination. The report of a doctor who may have examined the plaintiff only once, or a report of an investigator who may have contacted the plaintiff's neighbors and friends only once are wholly inadequate. The significant contrast is that the plaintiff's attorney has spent much time on intensive research and has all the evidence available to back up the opinion of his specialist. To meet such laborious investigation the defendant's attorney must spend a similar amount of time to prepare himself to attack the specialist and the lay witnesses on the causal relationship.

Before trial, and after receiving the bill of particulars, there are three obvious methods to obtain such material, namely, (1) a complete examination of the plaintiff by a recognized psychiatrist; (2) deposition examination of the plaintiff before trial; and (3) investigation among neighbors and friends, especially jealous ones.

The doctor selected by the defendant must make more than a cursory examination of the plaintiff and should fully discuss his findings with counsel. Recently, in a case where a pedestrian was knocked to the pavement by an automobile, the question concerned claimed psychosomatic injuries. The man was not hospitalized after the accident, and the entire medical expense was $90.00. Six weeks later the plaintiff experienced personality changes and was taken to the state hopstial. The carrier for the defendant employed a neurosurgeon, not a psychiatrist, to examine the plaintiff. This doctor examined the state hospital records and apparently noted the phrase "cerebral arteriosclerosis" (which was not the final diagnosis), and thereupon, reported back to the carrier that the psychotic changes were due to the arteriosclerotic condition in the man's brain rather than to any non-organic or functional disorder. This doctor's report to the company was not true, for the arteriosclerotic condition was but a temporary conclusion, and was later changed to involutional melancholia. The point of this is that where a defendant is limited to but one examination by his specialist, it should be made at the right time, preferrably shortly before trial, so as to cover any new developments or changes in the plaintiff's condition *and should be made by a psychiatrist.* If brain injury is present, a neurosurgeon should examine him and report on his clinical findings and the results of encephalography and other tests.

With a proper and full report from your specialist, discuss his findings with him in relation to the full and detailed investigation as to what the neighbors state about the plaintiff prior to the injury. Find out the difference in the man's conduct before and after the accident.

In the case cited above, the plaintiff's fellow employees were interviewed, and the investigation showed that the plaintiff kept to himself, did not understand the ordinary factory jokes, and some employees classified him as peculiar or queer, and not the same as other men. With this information, the plaintiff's specialist could be properly cross-examined to show the same apparent personality after the accident.

As to the third source, the deposition examination of the plaintiff prior to trial, the plaintiff generally will show a good memory as to past history, so that prior jobs, places where he lived and prior hospital confinements or accidents should be explored. His life should be carried back to his grammar school days, for presumably some emotional or psychotic conditions may have originated in his infancy or early youth. Such examination, though lengthy,

will pay off, for it can be used in investigating his claimed history for use at trial.

Most of the textbooks on the subject of psychosomatics emphasize past history, family life, and the interval between the accident and manifestation of symptoms as diagnostic aids. As was said in Cabot & Adams' "Physical Diagnosis", (13th Edition), p. 829,

> "One has the clinical impression that these disorders are more likely to be found where there is a family background of emotional instability and in patients who show some degree of autonomic nervous system instability, etc."

Thus, after obtaining all possible information, both medical and lay, about the plaintiff, the defendant's attorney, with a specialist's help, must answer the question whether the alleged condition is due to the accident *de novo* or is an aggravation of a prior condition. Generally speaking, the testbooks indicate that a slight body impact will not initiate a neurotic condition, but may precipitate it. Therefore, if the plaintiff's physician rests his opinion upon a *de novo* condition as a result of the accident, and the condition is obviously out of proportion to the severity of the physical or body injury, by all means such a doctor must be attacked on cross-examination; and if he is the only doctor called by the plaintiff, a breakdown of his testimony will surely defeat the claim. If, on the other hand, plaintiff's doctor relies on aggravation, another technique is necessary.

Noyes, in his "Modern Clinical Psychiatry", (Fourth Edition), mentions "Accident or Compensation Neuroses" (p. 466). This is consistent with the grouping of ailments by Weiss and English in "Psychosomatic Medicine", (2nd Edition) called nonorganic or functional disorders of people who have no definite body disease to account for such disorder (see pp. 4 and 5). Chapter 3 of this latter text will give the defendant's attorney ample ammunition for cross-examining the plaintiff's specialist to show the jury the prior existence of such functional disorders and the exclusion of organic disorders involving brain injury.

There are various techniques in handling the plaintiff's attending specialist. In asking him the prescribed treatment for the plaintiff, the answer is usually, "I talk to him about his past history to get his confidence, and permit him to relax." Now the ordinary juror does not understand that a patient without organic injury can be treated with conversation rather than the usual visible stock in trade of any doctor, medicine, pills, massage, or other treatment. Thus, the jury may not sympathize with the plaintiff, and, in fact, may discredit the entire ailment for lack of proper visible treatment, although the doctor may explain other forms of treatment such as psychotherapy, narcosynthesis, electric shock treatment, and other therapeutic methods, none of which are deemed absolutely curative.

A very important question to be resolved by defendant's attorneys by examination is the distinction between a malingerer and one who is actually subject to a psychoneurotic condition following slight trauma. The cross-examination should be focused upon an admission by the doctor for the plaintiff that there are no objective symptoms, and that even accepted tests do not confirm the existence of the malady.

Courts and counsel should be ever vigilant to separate for the consideration of a jury what portion of injury is compensable, and what part is non-compensable because of environmental or personality traits which were present before the happening of the accident.

Dr. Hubert W. Smith and Dr. Harry C. Solomon, in a most interesting paper entitled "Traumatic Neurosis in Court", appearing in Volume 30 of the Virginia Law Review, pages 87-175, have this to say on page 110 thereof:—

> "Still again, we may compare the pretraumatic condition of such a neurotic to a cracked vase. The unobservant or untrained eye may not notice the crack, but only that the vase will hold water. It is only when the crack spreads and the vase will no longer hold water that he is conscious of any defect. But the law of torts must follow the rule of the market place and take congnizance that a cracked vase is not so valuable as an intact one. If the defendant's conduct causes the crack to spread, he may justly insist that he shall not make compensation on any assumption that the vase was previously perfect. So here, traumatic neurosis resulting from trivial stimuli should be treated as mere accession to, or aggravation of, a pre-existing impairment. Once this truth is grasped we can expect to see the measure of damages lowered to more modest levels."

Recently a lady was injured when an au-

tomobile ran into the rear of the car in which she was a passenger. She hurt her back, not her head. She went to a general practitioner who, for the case, became an expert in neurology. She claimed reactivation of an epileptic condition, with twenty years elapsing since her last seizure. His diagnosis was that the plaintiff suffered accumulation of pain in her back which went up the spinal column to her brain, and, therefore, she had recurrence of epileptic seizures. Apparently the jury could not accept this, for the verdict was nominal, $400.00, simply for the two or three weeks of backache.

In another case, a female plaintiff, 52 years old, claimed aggravation of an ulcerous condition upon seeing, and perhaps eating, a small part of the leg of a bumble bee found in a can of pears. Was she a malingerer, or did she actually have this neurotic condition causing a serious flare-up of her ulcers? Her doctor testified concerning her psychoneurotic condition. She admitted on cross-examination that she suffered no ill effects from swatting a fly on more than one occasion. The trial judge sent the case to the jury upon the question of the result of the claims of the plaintiff, and the jury verdict of no cause for action confirmed the lack of causal relationship.

If a single prior experience can be explored to show exaggeration and compensation-mindedness, then we have a foundation to discredit the testimony as to the claims made before and after the occurrence. The jury then is free to discount all of the testimony, including the medical, in defendant's favor. Of course, the majority of plaintiffs cannot be classified as malingerers, and, therefore, caution must be exercised as to which plaintiff should be given this form of treatment by way of cross-examination. The essence of cross-examination of a malingerer must be to show the neurotic or psychotic condition was not originated by the accident, but actually preceded it. If the defendant's attorney is successful in showing this, then the only question is one of extent of aggravation, if any, as a proximate result of the trauma.

Doubt must be cast upon the relationship between the condition after the accident and the trauma itself. Perhaps, by coincidence, and at about the time of the accident, the plaintiff may have had an argument with his wife, or with his boss, or suffered a serious loss, or in one of countless situations, was going through a state of inward turmoil. If so, the doctor should be questioned as to whether such coincidental experience would also cause the alleged aggravation. The doctor must necessarily say "yes" in view of the impact of this coincidental experience, whatever it might be, upon the plaintiff's nervous system, including his low tolerance before the accident. Thus, the jury can well be persuaded to believe this non-accident situation was the more likely cause of the condition than the slight trauma.

The plaintiff's age, his family life, his work life, his social life, his sex life, and all other aspects of his prior physical being must be covered by investigation and presented in cross-examination, and by using all this information before the jury, surely, some of them will agree that the plaintiff was similarly psychotic before the accident, and thus deny recovery.

In defending against true and bona fide neuroses cases, it is suggested that defense counsel give every consideration to arranging immediate settlement discussions with the aim of accomplishing prompt and early settlements. Any delay resulting in prolonged settlement discussions serves only to bring about an aggravation and greater disability as to the claims of the plaintiff in such cases. Thus, prompt settlement, if possible, of these true neuroses cases is wholeheartedly urged.

Utmost care and painstaking procedures must be followed in handling traumatic neuroses cases as outlined above. Serial examinations with electroencephalograms, pneumoencephalograms angiograms and consultations are always required in these cases. The appraisal of any neurosis case based upon a single examination can only lead to disaster as far as the defense of such cases is concerned. Likewise, if plaintiff's counsel premises his neuroses cases upon a single, one shot, examination, defense counsel, through artful and well thought out cross-examination, should be able to destroy the medical testimony claiming a traumatic neurosis based upon a single examination as offered by counsel for the plaintiff.

Generally, traumatic neurosis does not develop in plaintiffs who are in good mental and emotional states.

Usually, the neurotic plaintiff develops such a condition by association with either slight or serious physical injuries, the neurotic state coming on as the end result

of a pre-existing mental and emotional instability. These "associated" cases are the ones which challenge the psychiatrists and trial lawyers who seek to obtain opinions concerning the extent of disability and the settlement value of such cases.

The areas of the body most susceptible to bringing about associated neurosis claims are: the low back, head, neck (whiplash) and areas where there have been crushing injuries or previous injuries, or arthritic conditions previously existing.

Also, in this medical area, particular attention must be given to the separation of the malingerer from the true traumatic neurotic. Such separation can only be achieved by repeat examinations as pointed out.

In conclusion, it must be stated that due to our present day mode of living and the tensions and pressures exerted upon the ordinary individual, there has been an increase in neurosis and nervous disorder claims in relation to our increasing population. Thus, it is reasonable to presume, counsel for the defense will be confronted more and more with claims of traumatic neurosis arising from accidents. Therefore, defense counsel must be prepared to give their clients the benefit of their opinions concerning the probability or improbability of such claims being caused from any given accident and claimed resulting injuries. In order to serve clients honestly, counsel must carefully consider all facets of such cases and weigh all the many factors involved so as to achieve a reasonable settlement of such claims with resulting even-handed justice to both the plaintiff and the defendant.

Injuries of the Arm and Neck; Their Medicolegal Aspects*

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AS A telephone system and electricity furnish communication and power to a city, so the spinal cord and nerves give sensation and power to the arm. The neck and upper extremity are closely related, and in this paper will be discussed as a unit. An injury to the nerves in the neck may cause a sensation of pain to be projected out on the arm where no injury has occurred. This is known as referred pain and indicates the close relationship between the neck and the arm.

Fractures are the most common serious injury of the upper extremity; they occur less often in the neck. Probably the most frequent fracture is at the wrist (the so-called Colles fracture) where the radius on the thumb side of the wrist is broken and the tip of the ulna on the little finger side of the wrist is likewise broken. Fractures of the collar bone or clavicle likewise occur with considerable frequency. A fractured clavicle may heal with some overlap, and the x-rays look poor, yet the function of the shoulder is entirely normal. This bone particularly illustrates that disability is not based on the appearance of the x-ray, but on the function of the injured member. However, when a fracture involves a joint surface, or involves two bones which must work together as a team (e. g. the radius and ulna of the forearm), a good x-ray picture will usually be necessary if good function is to be achieved. The standard of treatment, therefore, in fractures involving joints and in the forearm is usually higher and operation required more frequently, than in such bones as the clavicle, the shoulder blade, or scapula, and the bone of the upper arm, or humerus.

Sometimes other conditions must be distinguished from old fractures. There is a condition in which the collar bone or clavicle is divided into two halves. A case has been recorded in which a worker made repeated collections from successive employers for having fractured his clavicle and developed a non-union of the fracture, when actually he was born with this condition. At the wrist one of the small bones known as the scaphoid bone can have a similar condition called congenital bipartite scaphoid in which it is formed with two distinct halves, which never

*Paper presented at the Medicolegal Conference of South Dakota Medical & Bar Associations at Huron, South Dakota, on January 26 and 27, 1957.

unite. At the elbow an extra bone may occur on the back of the elbow called the patella cubiti which may be confused with a fracture of the tip of the elbow (olecranon). An x-ray of the opposite side will usually show the same condition when the patient was born with it, although this is not invariably so.

Combined fractures of the forearm, elbow and upper arm, the so-called sideswipe fractures, are frequently seen in automobile collisions. They usually occur in the left arm as a result of the driver on the exposed side of the vehicle having his left elbow out of an open window. Most of these cases result in a prolonged period of disability and a high degree of partial permanent disability of the limb. A stiff elbow at a right angle in a skilled laborer is usually given a disability rating of 60% of amputation of the arm. Operation is required in practically all of these cases in the treatment of the multiple injuries.

Dislocations are most frequently seen at the shoulder where the upper end of the humerus is dislocated forward, out of the shoulder socket (glenoid cavity). In some cases injury to the shoulder joint with dislocation results in a loose shoulder and repeated dislocations subsequently, even with such trivial movements as putting the hand behind the head with the elbow out to the side. The head of the humerus may also dislocate backwards or posteriorly, and unless x-rays are taken from below upward to give a vertical view, dislocation is easily overlooked. About 5% of dislocations at the shoulder are associated with an injury to the nerves in this region, but usually they will recover by themselves. Dislocations at the elbow are usually associated with small chip fractures of the bones comprising the elbow joint. The upper end or head of the radius is frequently fractured and may have to be taken out completely, or the pieces will block the motion of the elbow. The elbow joint is a complex joint and frequently there is some limitation of the motion in the elbow afterward. Dislocations which occur in the neck are frequently associated with some paralysis and there is often loss of sensation in the skin below the level of the dislocation. If the dislocation in the neck (cervical spine) is sufficiently great the spinal cord may be severed completely. If the dislocation is not complete, replacement or reduction of the dislocation to its original position may relieve the pressure on the cord and permit the cord to function again so that the paralysis disappears as does the loss of sensation. If the spinal cord is severed partially or completely, nothing can be done to the cord itself to restore the nerve tracts which have been severed. Orthopedic surgery may help in some of these cases by operations on the tendons, bones and joints in the arm and hand. At the wrist a dislocation which is common is that of one of the small wrist bones called the lunate or semilunar bone, which usually dislocates toward the front side of the wrist (anteriorly) where it may cause pressure on the nerve which goes to the thumb, index and middle finger (median nerve).

The tendons connect the muscles with the bones to make the bone move when the muscle contracts. If the tendon is cut or severed no motion of the bone or extremity occurs even though the proper muscle contracts in response to a normal impulse from its nerve. This is of particular importance in the shoulder where the small tendons on the top of the shoulder may be torn loose by an injury. The patient is unable to move his shoulder out to the side normally and is frequently thought to be a malingerer after x-rays of the shoulder appear entirely normal. The injuries to the tendons about the shoulder (musculo-tendinous cuff) occur typically in men of 40 or over and may even follow a trivial type of injury such as falling against the shoulder. The skin and outward appearance of the shoulder are entirely normal and the injury to the inside structures can easily be missed.

Injuries to the nerves may occur in the region of the shoulder (brachial plexus), or they may occur further down the arm particularly in the radial, median and ulnar nerves. Pressure may occur on the nerves where they come out from the spinal column by a protruded disc, tumor, a fracture or dislocation. The results of surgery on the nerves are not as good as with some other types of surgery. Probably the best results with this group of cases are on repair of the radial nerve which carries the nerve impulses that straighten out the fingers and thumb and cock up the wrist. When the nerves cannot be satisfactorily repaired, tendon transplants and other surgery can be done.

Traumatic arthritis frequently follows injury or fracture to a joint surface. In a

Colles fracture of the wrist, traumatic arthritis is a not infrequent complication which leads to weakness and permanent disability. To conclusively prove on x-ray the diagnosis of traumatic arthritis one must show changes in the joint on x-ray compatible with traumatic arthritis; if they are progressive over a period of time the diagnosis is doubly confirmed. The condition may not be demonstrated by x-ray early. If, however, the joint has been operated on and irreparable damage is found at operation, a definite diagnosis can be made before the advanced changes can be seen on the x-ray (since the x-ray changes are late findings.) Traumatic arthritis seems to occur most often in joints which are used frequently, particularly for weight bearing, and also in those where the blood supply to the injured bones is poor, as in some fracture-dislocations of the shoulder joint.

Injuries to the arteries may result in loss of blood supply to the muscles and other tissues out further on the arm and hand. The blood vessels which are not injured dilate to carry the additional blood of the injured blood vessel, to form "collateral circulation." This may be adequate to furnish blood to the arm and hand. If the tissues do not receive enough blood to sustain life, they die; gangrene is then said to be present. If the blood supply to the muscles on the forearm is partially lost the muscles are replaced with scar tissue and lose their ability to contract. A clawhand then occurs which is called Volkmann's contracture. The latter condition occurs particularly in fractures of the elbow and to a lesser extent the forearm.

In recent years whiplash injuries of the neck have become increasingly frequent and constitute a common source of complaint, whereas, 20 years ago one never heard of this complaint. The usual story is that the car in which the plaintiff was riding was struck from the rear by another car, snapping the plaintiff's neck forward with the momentum of the impact. In the Journal of the American Medical Association of October 27, 1956, a report was made of a survey of 100 cases of whiplash injury after settlement of litigation. Of 100 patients with whiplash type of injuries, who were interviewed subsequent to settlement of legal claims for damage, 88% had recovered, 54 with no residual and 34 with minor symptoms not requiring any treatment. Twelve percent were said to have severe symptoms, but only six percent of these are under medical treatment. Surgery was necessary in only 2 cases and was beneficial on both. Many psychosomatic symptoms developed and were manifested in some way in 85 percent of the cases. Loss of time for as long as three months occurred in 41 percent of these cases prior to settlement of claims, but only 7 percent subsequent to settlement of claims. The evidence indicates the greatest difficulty in evaluating whiplash type of injuries due to the complicating factor of monetary compensation.

If the injury, which whiplashes or jerks the head forward, is not severe the ligaments between the vertebra are strained and not actually torn or disrupted. This strain or sprain may cause local pain and temporary limitation of motion, but the results are not considered permanent. On the other hand, if the force was of such severity as to rupture these connecting ligaments between the vertebra and cause momentary dislocation of the cervical joints, the injury will be of a more permanent character. This is a type of dislocation of the neck. In many cases the displacement forward is replaced by itself when the neck jerks backward secondarily on the rebound from the impact and the condition may be overlooked. There may be bleeding around the spinal cord, paralysis and even death, but the ordinary x-rays show no bone or joint injury, because the dislocated vertebra has slipped back into position. If the joint is injured and torn loose, the bleeding and swelling around the adjacent nerve roots may cause pain referred down to the arm, forearm and hand, and up into the neck and back of the head. The question naturally arises, how can the first injury the sprained neck, which is minor and does not result in permanent disability, be objectively differentiated from the second type of injury in which the ligaments are torn and the joint momentarily dislocated. This can be done by taking an x-ray with the neck in a bent or flexed position. In the latter position the injured joint will show a slipping of the vertebra at this joint so that the upper vertebra displaces forward on the lower vertebra. With this, there are objective clinical findings such as muscle spasm, limitation of motion and a protective way of holding the head. It is in this type of case that permanent disability can

be expected. With such a loose joint, operation, consisting of a bone graft across the loose joint, may be necessary. The latest present evidence indicates that more claims have been paid for this type of injury than are warranted by the objective evidence or the treatment required after settlement of claims.

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"Legal Mortis"*

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AS I FOLLOW current events and notice the actions from the Supreme Court to the most learned lawyers, it appears that we are going through what will be referred to in history as "The Age of Litigation". It therefore seems to be appropriate to discuss some of the medico-legal aspects of this age in which we live. "Legal Mortis", sometimes referred to as "Rigor's Legals", might be defined as that reaction of a patient's mind and body to the knowledge that another party may be financially responsible for physical or mental suffering. The fact that the condition is usually not lethal makes it no less awe-inspiring and perplexing. It sets in long before death and, in fact, seems to confer an unusual quality of longevity.

The prodromal symptoms vary. The onset may be especially rapid when a lawyer escorts the patient into the office on the initial visit. Paradoxically, the initial medical care is often remote from the alleged date of the accident. In some cases it is slow and appears at a time when the affected patient has almost completely recovered. As an example, a patient has been recovering satisfactorily for several months, then for no apparent reason all of his symptoms seem to be worse, having adverse effects on his job, family, and all his environment. A careful examination reveals no objective findings to substantiate the subjective complaints. The true nature of this relapse is usually clarified by a very casual remark of the patient as he leaves the office, "Doctor, I have a lawyer, would you mind sending him a report concerning my condition?"

Once "Legal Mortis" is established, there can be no predicting the various reactions. One unusual feature is a "metastatic symptom". In recording the complaints, the physician may ask the patient if she has backache. Before the patient can reply, the husband sitting nearby answers minutely that she has severe back pain with radiation to the left great toe, aggravated by sneezing and that she never has had a pain prior to the accident. In the absence of the husband the symtoms may "metastasize" to other relatives or the lawyer who usually is sitting nearby. These "metastasizing symptoms" can usually be placed in proper perspective by quoting by name the various individuals offering the information, thank them for their aid and explain that they will be quoted directly in your report. This may prevent further "metastasizing symptoms" and at times causes a miraculous retraction of the entire "metastatic symptom" complex. A method of quoting directly in one's progress notes and reports helps clarify other manifestations of "Legal Mortis". As an example, the physician is not infrequently confronted with a patient under his care who has previously made no reference to an on-the-job injury or other litigious condition during the course of the treatment. At some later date he states that it was an on-the-job injury and requests a report. This can be handled by quoting the patient directly in your progress note, but explain to the patient clearly that your previous records show no information concerning the injury. Inform him that you will be glad to quote him as the date he first mentioned the injury and make any statement he wishes in direct quotes, explaining however that if a report is required of you, you will give the initial his-

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tory as he gave it and you will also give this additional information given at a later date. This puts the delayed recollection of an on-the-job injury in its proper perspective with the patient, insurance carrier, and the Industrial Commission.

Another example of the paradoxical nature of "Legal Mortis" is the inability of the patient to actually describe his symptoms to the physician. The lawyer, having received the report, calls and states, "Doctor, I just don't understand it, your report states that the patient's chief complaint is some soreness in her neck and she tells me she has pain in both arms, constant headache, and is unable to do any work because of the severe neck pain." In this event one may repeat the examination and hope that at a later date the patient will confide his complaints to his physician as well as to his lawyer.

Lawyers should have insight into these cases of "Legal Mortis" but their clairvoyance seems to be completely dependent upon whether they represent plaintiffs or defendants. As an example, a defendant's lawyer calls to say that the patient is allegedly injured but that he knows the injuries are extremely mild and he wants a report just for the record. The plaintiff's lawyer calls about the same patient to say that if the severe injuries sustained by the patient will permit, he will be brought in by way of ambulance. Another aura of "Legal Mortis" that often precedes the patient's visit is a large file of medical reports. To avoid this "Legal Mortis" from becoming contagious and rubbing off on some of the physicians, one should examine the conclusions in these many reports *only after* the examining physician's own unbiased report is completed. The physician can cope with "Legal Mortis" in a more equitable manner if he does not allow himself to be labeled a "Plaintiff's Doctor" or a "Defendant's Doctor". He should remember at all times that he is a witness and not an advocate. He may be an advocate for his opinion, but he should not think of himself nor allow others to think of him as for or against the plaintiff or defendant. If the physician allows himself to continually examine patients for one side, either plaintiff or defendant, he will subconsciously lose his objectivity in his reports and testimony. If he does not remain objective, his reports and opinions will be of little value to the patient, to the court, or to either side in the litigation.

The Place of the Doctor in Litigation*

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THE doctor comes into litigation as a witness, either actual or prospective. There are four main ways in which he gets into the witness chair: (1) He may have been a bystander at or participant in some action or transaction that has become a source of controversy. We are not today concerned with this aspect because he then comes before the court in his lay capacity as a citizen. (2) He may have been the attending physician or surgeon. (3) He may have made an examination to acquaint himself with the facts to thereafter qualify himself as a witness. (4) He may be in court for the sole purpose of answering a hypothetical question without ever having seen the person as to whom the question relates. In the last three instances, he appears as a scientific witness and expert and, as such, is received and treated precisely as any other expert. Many definitions have been given of the term "expert," but this one will probably suffice:

> "Persons who are professionally acquainted with some science or are skilled in some art or trade, or who have experience or knowledge in relation to matters which are not generally known to the people." (Black)

Perhaps, to more clearly outline the field of expert witnesses, it is desirable to briefly state some of the qualifications which the law deems essential to qualify any person appearing upon the stand as a witness. It is assumed that an adult has

*Paper presented at the Medicolegal Conference of South Dakota Medical & Bar Associations at Huron, South Dakota, on January 26 and 27, 1957.

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the mental capacity to recognize and relate ordinary matters he has seen, heard, or in some other manner experienced. He declares a willingness and intention to be truthful and then must show that he has some knowledge as to one or more facts which are relevant to the question or questions in issue. In this sense, knowledge is used as a relative term, of course, for if a witness had absolute knowledge and it were so conceded there would never be need for more than one witness to any particular fact. This we know is not true. So, it is better to qualify the statement as first made and say that the person must think he has knowledge, or perhaps we may be slightly cynical and say that he claims to have knowledge. To establish this qualification he must first testify as to facts sufficient to establish an opportunity to have acquired knowledge as to the matters he intends to relate. In other words, he must establish a knowledge based upon the exercise of one or more of his senses and not upon the statement or reports of others. The latter type of information is known as hearsay in the field of law.

The expert witness comes within a somewhat different classification. The law recognizes that there are many fields in which the ordinary inexperienced or untrained person is not qualified to recognize and evaluate those things which he does see, feel or otherwise experience. It, therefore, requires that in these fields in which the ordinary layman is not qualified either by occupational experience or systematic training, or both, to acquire accurate knowledge, there be first established such experience or training as will give reasonable ground for supposing the possession of such experiential capacity by the witness. When this has been shown, the witness is then considered an expert in the field involved.

The witness, testifying as to facts acquired through the exercise of one or more of his senses, places those facts before the jury or the trial judge, if it be a case tried without a jury, and in the usual case it is then the province of the trier of the facts to draw from such testimony inferences and conclusions as to the ultimate facts. However, there are numerous instances in which the jury or trial judge lack this thing I have called experiential capacity to draw correct or accurate inferences or conclusions from facts as related by an expert witness and, in such situations, another rule, known as the opinion rule, comes into play. This rule permits an expert to express his opinions and conclusions upon the facts as established by the evidence and, in so doing, in practical effect, he thereupon takes the place of the jury or trial judge. The extent to which such opinions and conclusions are binding varies with the degree of experience or training necessary to the formation thereof. As examples, one would say that the opinion of a car body repairman as to the damage sustained by an automobile might be rather lightly held by a jury whereas it is the law of this state that malpractice cannot be established other than by the testimony of experts, our court having said:

> "Because the central issues of this case, viz; (a) negligence, and (b) its causal connection with the injury suffered by the plaintiff, turn upon scientific questions laymen are not qualified by learning or experience to answer, plaintiff was required to establish those elements by the testimony of experts." *Lohr v. Watson,* (S.D., 1942) 2 N.W. 2d 6.

To the end that the jury or trial judge may be able to properly utilize these expressions of opinion it is oftentimes vitally necessary that the facts upon which the witness bases such opinions be fully placed before them or him. I believe that this may be well illustrated by the following excerpt from an instruction often given in connection with the testimony of experts when hypothetical questions have been asked and answered.

> "Testimony given by the experts who testified in this case, including their opinions, is proper for your consideration, subject to the same rules of credit or discredit as apply to any other witness, but such tesitmony is not conclusive upon you in this case. Whether the matters testified to by any witness as facts are true or false is to be determined by the jury alone.
>
> "In examining an expert witness attorneys may ask him or her what is known as a hypothetical question. By such question the expert is asked to assume the truth of certain facts stated in such question and to base his answer upon such assumption. His opinion

neither establishes nor tends to establish the truth of such assumed facts upon which it is based. It is for the jury to determine from all of the evidence, facts and circumstances whether or not the facts assumed in any hypothetical question have been proved, and if you do not believe that any fact so assumed in any hypothetical question has been proved you will then determine the effect of such failure of proof upon the value and weight of such expert opinion based upon the assumption of the truth of such fact."

From this it is to be seen that the jury or trial judge is not assuming to pass upon the correctness of the conclusions of an expert witness, but rather upon whether the facts assumed have been established in the manner in which the law requires.

We, therefore, find the physician or surgeon approaching the witness stand to testify as to those facts peculiarly within his knowledge and to draw therefrom those conclusions which his scientific knowledge teaches him to be correct. At this point it may be proper to digress momentarily and say that while it is not permissible, generally speaking, to testify as to matters not based upon some involvement of the human senses of the witness, the data of every science are numerous in scope and variety. No one professional man can know from personal observation more than a minute fraction of the data which he must every day treat as working truths. Hence, a reliance on the reported data of fellow scientists learned by perusing their reports in books and journals. The law must and does accept this kind of knowledge from scientific men.

He is about to be called upon to divulge matters which he has learned in the course of his professional relationship with some party to the action, and, undoubtedly, there comes to his mind that portion of the Hippocratic Oath, "Whatever I see or hear, professionally or privately, which ought not to be divulged, I will keep secret and tell no one."

Literal application of the language of this portion of "The Oath" would seem to place upon the physician himself the duty of determining the meaning and application of the words "which ought not to be divulged" and, to the end that we may clearly understand the situation as it actually exists, it is perhaps well to discuss and consider this phase at once.

On the general duty to testify one may find early precedent in judicial history. As early as 1612 Sir Francis Bacon said, in the Countess of Shrewsbury's Trial, "You must know that all subjects, without distinction of degrees, owe to the king tribute and service, not only of their deed and hand, but of their knowledge and discovery. If there be anything that imports the king's service, they ought themselves undemanded to impart it; much more, if they be called and examined, whether it be of their own fact or of another's, they ought to make direct answer." (2190 Wig.)

A very learned authority has more recently written:

"From the point of view of society's right to our testimony, it is to be remembered that the demand comes, not from any one person or set of persons, but from the community as a whole, from justice as an institution, and from law and order as indispensible elements of civilized life. The dramatic features of the daily court-room tend to obscure this; the matter seems to be between neighbor Doe and neighbor Roe; we are prone to shape our own course by the merits of the one or the other of their causes. But the right merely happens to be exemplified in the case of Doe v. Roe; that is all. The whole life of the community, the regularity and continuity of its relations, depend upon the coming of the witness. Whether the achievements of the past shall be preserved, the energy of the present kept alive, and the ambitions of the future be realized, depends upon whether the daily business of regulating rights and redressing wrongs shall continue without a moment's abatement, or shall suffer a fatal cessation. The business of the particular cause is petty and personal; but the results that hang upon it are universal. All society, potentially, is involved in each individual case; because the process itself is one of vitality. Each verdict upon each cause, and each witness to that verdict, is a pulse of air in the breathing organs of the community. The vital process of justice must continue unceasingly; a single cessation typifies the prostration of society; a series would involve its dissolution. The pettiness and personality of the individual trial disappear when we reflect that our duty to bear testimony runs not to the parties in that

present cause, but to the community at large and forever." (2192 Wig.)

This general duty has been implemented by very specific provisions and a form of process known as a subpoena by which a witness is compelled to attend and, under certain circumstances to bring specified records, papers and documents with him. With reference to this it is further provided, "Disobedience of a subpoena, or refusal to be sworn, or to answer as a witness, . . . when lawfully ordered, may be punished as a contempt of the court . . ." (SDC 36.0304) This particular provision is supplemented by another which provides, "The witness shall also be liable to the party injured for any damages occasioned by his failure to attend, or his refusal to be sworn, testify, or give his deposition." (SDC 36.0306)

But I am digressing. The precise point was the interpretation to be placed upon the language of the Hippocratic Oath in the light of the legal obligation of witnesses to testify.

One of the earliest recorded instances of this seeming conflict appears in connection with the Duchess of Kingston's Trial in 1776. A physician on the witness stand was asked as to his knowledge of a marriage between the accused and her alleged husband and he replied, "I do not know how far anything that has come to me in a confidential trust in my profession should be disclosed, consistent with my professional honor." He was at that time told" . . . a surgeon has no privilege where it is a material question in a civil or criminal cause to know whether parties were married or whether a child was born, to say that this introduction to the parties was in the course of his profession and in that way he came to the knowledge of it . . . If a surgeon was voluntarily to reveal these secrets, to be sure, he would be guilty of a breach of honor and of great indiscretion; but to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever." (2380 Wig.)

Accordingly, we may commence with the major premise that it is not within the province of the physician or surgeon to determine, from his own conclusion, as to what matters he will or will not divulge when called as a witness. That is a power reserved to the state and in this state it has been thus expressed:

> "A physician or surgeon, or other regular practitioner of the healing art, cannot, without the consent of the patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to properly act for the patient." (SDC 36.0101 (3))

It is to be observed that this so-called privilege relates only to civil actions and has no existence in connection with any criminal action or proceeding.

Further examination of the statute also discloses that it is specifically provided by SDC 36.0102:

> "The objection that the communication is privileged must be made by or in behalf of the person making the communication."

It would seem to follow that the so-called privilege is of no concern to the professional witness unless such privilege is claimed. However, SDC 36.0103 appears to indicate a somewhat different approach to the problem in that it provides:

> "It shall be the duty of the court, of its own motion and without waiting for objection to advise a witness at the appropriate time of his *right to refuse* to answer any question requiring the disclosure of any privileged communication."

Insofar as I am aware this seeming conflict has not been resolved by any decision of our supreme court. However, it would be my observation that the professional witness would be well advised to follow the interpretation of the trial judge rather than to assume to interpret and apply the statute himself with what might be uncomfortable personal consequences. At this juncture it is probably appropriate to say that, while he may at times so appear, the trial judge has not been completely relegated to the status of an umpire, and a witness may at any time even without an objection having been made, appeal to the trial judge for his ruling upon the propriety of answering a question propounded. Thus the question as to the necessity of answering a question which seems to the physician or surgeon to be an invasion of the privilege granted by statute to the professional relation may be passed on to the trial judge and will become his responsibility.

Now this privilege of the patient may be waived in express language as is frequently done in insurance applications or through simple agreement between the parties to an action. Clealy any and all claim of privilege is waived when a physician is called and examined by the attorney for the patient. Opposing counsel may then, on cross-examination, interrogate him fully. But it is not necessary that the physician be called. Consent is to be implied, according to our statute:

> "If a person offer himself as a witness he thereby waives any privilege he might otherwise claim, which would prevent the examination of his attorney, spiritual adviser, or healing practitioner on the same subject within the meaning of sub-divisions (2), (3) and (4), of Section 36.0101. . . ." (SDC 36.0102)

SDC 36.0602 provides for a compulsory "physical or mental examination or blood test by a physician" upon order of the court. SDC 36.0603 provides that the one examined may demand a copy of a detailed written report of the findings and conclusions of the examining physician but as a consequence of such demand, provides; "After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the mental or physical condition."

By SDC 36.0604 it is further provided:

> "By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition."

Thus it appears that it is not the policy of the law to permit concealment of medical findings in any action in which an issue arises as to the physical, or mental, condition of a party to that action.

Perhaps at this point, having dealt with the question of the privilege of the patient we may properly consider the question as to the obligation of the doctor to testify in his professional capacity, as contrasted with his lay character as a citizen. May he be coerced to testify as a professional witness and, if so, upon what terms?

It should be kept in mind that, at the outset, we indicated that three ways in which a doctor comes to the witness stand would be considered, viz., as the attending physician or surgeon, as one who has made an examination of the patient to qualify himself as a witness, and as one who comes into court solely to answer a hypothetical question without having ever examined the patient. I think that we may safely say that the question of compulsory attendance has no relation to the last two classes. Clearly the physician or surgeon is not compellable to make the qualifying examination of the patient. If, however, he does do so he then has knowledge of facts and that is a different matter. It would seem to be equally clear that he would not be subject to subpoena for the sole purpose of answering a hypothetical question. Therefore we shall deal with the doctor who is or was the attending physician or surgeon and include with him the doctor who has actually made an examination to qualify himself as a witness.

A situation arose in California in which a physician specializing in nervous and mental diseases examined a man. He did not advise or treat the man but made the examinations solely for the purpose of advising the man's attorneys in their preparation of the man's lawsuit. Thereafter, the other party sought to take the physician's deposition and he declined to answer any questions for two reasons: (1) that the information was privileged, and (2) that he was not required to divulge this information on the ground that "the use of the faculties of a physician, neurologist, and psychiatrist and for an opinion based thereon, which opinion is a portion of my property which I do not wish to be deprived of without due compensation and arrangement having been made in relation thereto." The Supreme Court of California in passing upon this last contention wrote:

> "Doctor Catton asserted a privilege personal to himself, a privilege not to testify to knowledge and opinions that were the result of his special learning without payment of more than the ordinary witness fee. Petitioner asks him to testify not by reason of his expertness in a special field but because of his knowledge of specific facts as to Hes-

sion's condition, facts pertinent to an issue to be tried. He is like any other witness with knowledge of such facts; it is immaterial that he discovered them by reason of his special training. In testifying as a witness he would simply be imparting information relevant to the issue, as he would had he been a witness to the accident in which Hession was injured. 'A physician who has acquired knowledge of a patient or of specific facts in connection with a patient may be called to testify to those facts without any compensation other than the ordinary witness receives for attendance upon court.'" *San Francisco v. Superior Court,* (Cal., 1951) 231 P. 2d 26, 25 A.L.R. 2d 1418.

In this connection it may be of some interest to report that, notwithstanding the above ruling, the physician was not compelled to testify, the final determination being that the information was privileged as being within the ambit of the attorney-client relation (as somewhat expanded by the California statute on that subject) and that the physician was acting merely as the injured man's agent in obtaining and conveying information to his attorneys.

It is said that the weight of authority inclines to the view that an expert witness is not entitled to demand extra compensation before testifying to facts within his knowledge, although it may have required professional study, learning or skill to ascertain them. (Anno. 2 A.L.R. 1576)

The rule has been thus rationalized in an opinion of the Supreme Court of Kansas:

"There are experts of many kinds, professional as well as lay. Many men are experts in certain lines of endeavor. If doctors, dentists, lawyers, and engineers may refuse to testify concerning matters on which they may have opinions due to their respective trainings, simply because special fees have not been paid them, then one qualifying as an expert shoe repairer may not be compelled to state what was the matter with shoes he repaired because what he did was done in an expert capacity and his expert witness fees have not been paid. It can readily be seen that such a situation would be intolerable. It would tend to permit those who could afford it to produce witnesses whose testimony might be said to be expert, and would prevent those without requisite means of the benefit of such testimony. We are not referring to that class of cases where special preparation is required as a condition precedent, but to those where the witness is interrogated as to facts and opinions which he knows and has without such special preparation. In the absence of a statute authorizing the trial court to fix expert witness fees, or permitting the witness to refuse to testify until a stipulated fee has been paid, we are not disposed to hold that a witness claiming to be an expert called upon to give expert testimony may refuse to testify unless his demands have been met. . ." *Swope v. State,* (Kan., 1937) 67 P. 2d 416.

However, as a practical matter it may be said that while any witness is expected and may be compelled to give testimony as to facts within his knowledge, it will be an extremely rare occurrence for an expert to be interrogated as to his opinions and conclusions without prior arrangements having been made with him as to his compensation. Rightly or wrongly, and without intending any odious imputations, a trial lawyer is desirous of the most affable climate before asking opinions of any expert witness.

In this connection it may be said that South Dakota law provides for the appointment of experts by the court, provides that the court may fix the amount of their compensation, but leaves the question of compensation for non-court appointed experts to the agreement of the interested parties. The most that can be said of our statute, in its application to the usual lawsuit, is that it recognizes the propriety of extra compensation for one who is called as an expert witness.

Lastly, in consideration in this paper but, of course, not in its importance, we come to the actual testimony to be given by the doctor, and there looms the shibboleth of the rules of evidence.

It has been written that the two great aims of the system of evidence are:

(a) None but facts having rational probative value are admitted, and

(b) All facts having rational probative value are admissible, unless some specific rule forbids.

Ordinarily those cases in which a physician appears as an expert witness are tried before a jury and we are, all of us,

sometimes rather annoyed by an excess of objections and constant squabbling and bickering as to the admissibility of the proferred evidence. The justification of these rules of evidence (not, of course their misuse) was expounded by a very learned judge in the following language:

" . . . But it is the entrusting of the fact-finding function to jurors, honest and zealous but sometimes lacking the judge's special training, which necessitates the strict application of evidentiary rules.

"It is easy enough to answer that the jurors in their own affairs, like all mankind, rely on hearsay, pure opinion, even on guesses, intuition and hunches. That's the way the world runs, and why should the fusty old courts treat jurors like children who cannot be allowed to listen to the facts of life, or like incompetents whose thinking must be done for them by the judges? But because a citizen orders his own affairs on curbstone advice or casually passes along gossip as a fact, it does not follow that, as a juror, he can apply such methods to solemn arbitraments as to his neighbor's property or liberty. A juror, as soon as sworn, becomes a party of the judicial institution and function. His pre-possessions and prejudices he must park outside, with his car. Inside the courtroom he is no longer licensed to make snap judgments or to apply his workaday superstitions. He must come to his judgments by thinking, and there is no time to teach him how to think, how to reach right conclusions from appropriate premises, how to discard and ignore, or how to shut his ears to the irrelevant, the distracting and confusing. The centuries-old judicial institution, in which he takes temporary office, substitutes, for the course in logic for which there is no time available, time-tested methods of keeping from his ears that which cannot in logic and justice, be useful to the decisional process.

"If a juror has a trained and efficient mind, he is not the loser by this exclusion. The laws of evidence do for him what he would inevitably do for himself if he had to. On the other hand, if a juror's training and his customs have not habituated him to right methods of arriving at conclusions, he has no cause for complaint when the law, out of its ancient wisdom, sees to it that he is furnished right materials only." Judge Charles S. Desmond, N. Y. Court of Appeals, Article in Vol. 41 ABA Journal, page 209, March, 1955.

Now, the type of evidence, known as hearsay has been defined by our own supreme court in the following language:

"Evidence is called hearsay when its probative force depends, in whole or in part, on the competency and credibility of some person other than the witness by whom it is sought to produce it." *Johnson v. C. & N. W. R. Co.*, (S. D., 1949) 38 N.W. 2d 348.

Such evidence involves an attempt to restate something that has been told the witness by some other person, as proof of the truth of such statement. The rule does not, of course, apply in cases in which the only question at issue is as to whether the person did or did now make the statement. May I illustrate the distinction in this manner? Supposing the physician is called in connection with a prosecution for an assault with a dangerous weapon upon one who becomes his patient. He would not be permitted to testify that the patient told him that the defendant, John Doe, stabbed him with a knife, because he could not personally vouch for the truth of all the facts contained in the statement. It would be hearsay. However, suppose the patient had accused John Doe of stabbing him, that John Doe denied such act and was bringing a civil action to recover damages for the slanderous imputation. In this situation it would be entirely proper (evidentially) for the physician to testify as to the same statement on the part of his patient, because the truth or falsity of the statement would not necessarily then be in issue and the evidence would be offered to establish the fact of the accusation, rather than the truth thereof.

In some measure related to this rule is the one which prohibits the admission of self-serving declarations of a party, and its corollary which freely admits declarations of a party when against his own interest. These rules, like most of the other rules of evidence, are based upon human experience which indicates that we are all prone to think of reasons and excuses to justify our action or inaction but are equally loath to admit our own derelictions.

I have dwelt at some length upon these

rules because they have a rather direct bearing upon the testimony which the physician is going to be permitted to give.

When he sees a patient he deals in symptoms both objective and subjective and, to the end that you may understand my personal use of these terms, I define my understanding and use of them to be:

> Objective: Perceptible to others than the patient, subject to measurement or demonstration.
>
> Subjective: Any and all others.

It will immediately occur to physicians that they must, of necessity, accept certain subjective symptoms in making their diagnosis and prognosis of the case and that, under the definitions I have given these may be classified as self-serving declarations of the patient. This is true. However, again the law recognizes the overriding impact of self interest and, upon the assumption that the patient will be truthful in his desire to obtain the best possible diagnosis and treatment, permits the utilization by the physician and the introduction in evidence by him of any and all subjective symptoms related to him by the patient, which were necessary to sound diagnosis and treatment. This rule, however, has no application to one other than a physician or surgeon who administers or intends to adminster treatment of some sort. In other words, when a physician or surgeon makes an examination solely to qualify himself as a witness, we again have this principle of self-interest appearing, but this time in reverse. The law now considers that the patient seeks only a favorable statement and opinion from the expert. Needless to say, statements by the patient as to the claimed circumstances of his injury, who was at fault, etc., are not necessary to diagnosis and treatment and therefore are, quite properly, subject to objection.

Another exception to the rule relating to hearsay evidence is the one which permits the introduction of what is known as a dying declaration in cases of homicide. Again we deal with a rule of necessity, as to which our court has said:

> "Dying declarations are admitted from the necessity of the case, to identify the prisoner and the deceased, to establish the circumstances of the res gestae, and to show the transaction from which the death resulted." *State v. Clark,* (S.D., 1923) 194 N.W. 655.

Since such declarations are inadmissible until it has first been established that at the time of their making the declarant was conscious that he or she was then *in extremis,* the physician's function may be two-fold. If such a declaration was made in his presence, and it is most likely that it would be, he must be prepared not only to relate such declaration but also to state the facts relied upon to establish that the declarant was at the time conscious of the fact that he or she was *in extremis.* This consciousness may be established not only by the express statements of the decedent but may also be inferred from the conduct, condition or other statements of the decedent.

It is reasonably apparent that no busy doctor is going to be able to retain all of these matters in his memory without some written aids and it, therefore, seems entirely appropriate to make mention of the matter of records.

A witness may always, within the limits of the other rules of evidence, testify as to matters which he then recollects, and this rule is not changed by the fact that he may have refreshed his recollection immediately before going on the witness stand or while on the stand, nor is it particularly important how he has thus refreshed his recollection if he is prepared to swear that at the time of testifying he is doing so from his own recollection, refreshed or otherwise. Thus it appears that adequate records are desirable for the purpose of memory refreshment.

However, perhaps recourse to the records does not result in such refreshment as to attain a present independent recollection.

The records are still useful because the doctor may testify from them, if he is prepared to swear that they were made by him or under his supervision at or about the time of the occurrence and that he knows that they accurately state the facts.

There is yet another way in which records may be admissible in evidence. In recognition of the generally acknowledged fact that business records are, in fact, accurately kept in most instances, that such records are usually accepted as authentic in everyday life, and that it would be well nigh impossible, in many instances, to call before the court all of the individuals who were instrumental in making and keeping such records, there has been adopted, as

a supreme court rule in this state, the following:

"The term 'business' shall include every kind of business, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

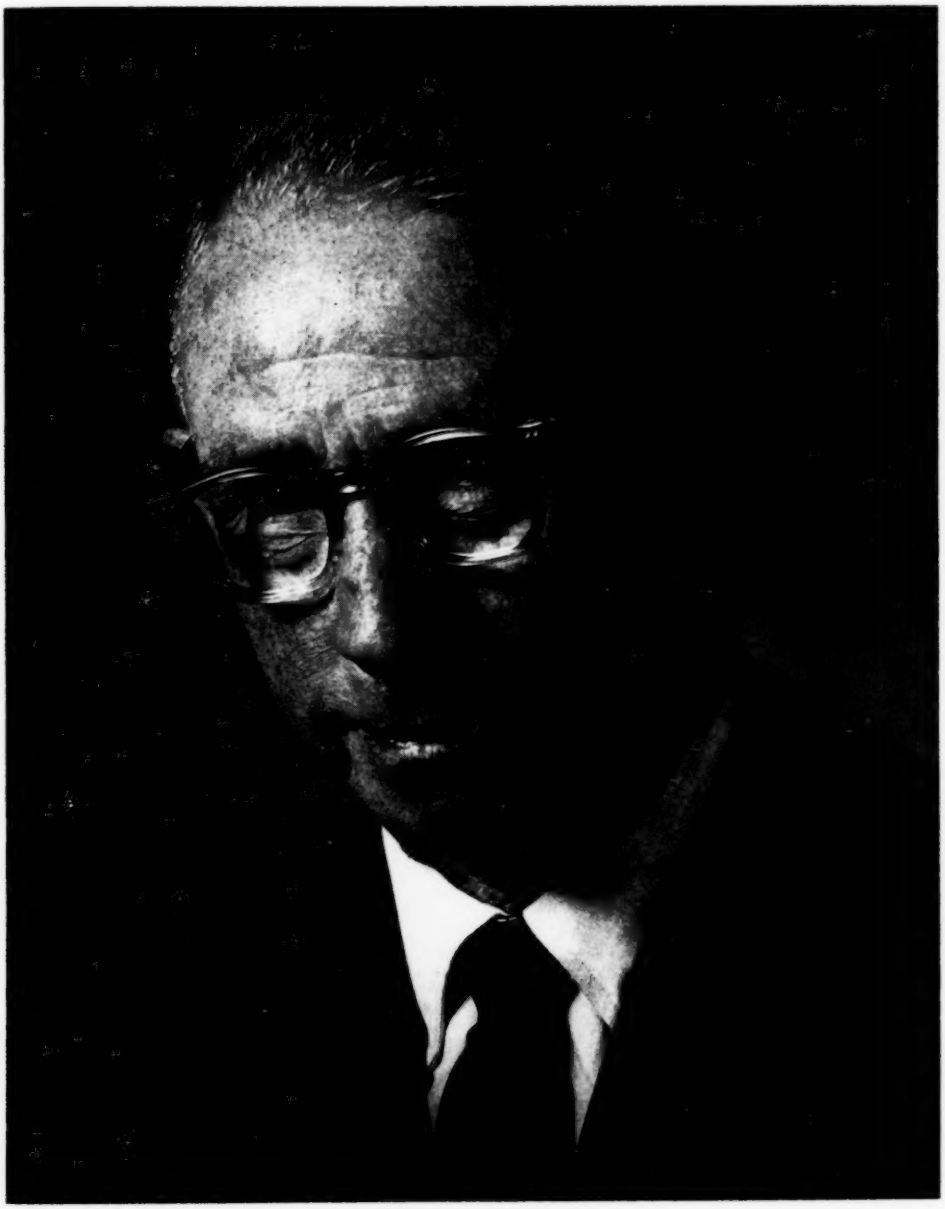
"A record of an act, condition, or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission.

"This section may be cited as the Uniform Business Records as Evidence Act." (SDC 36.1001) (Cf. *Gile v. Hudnutt,* (Mich., 1937) 272 N.W. 706; *State v. Evert,* (S.D. 1928) 219 N.W. 817)

It is apparent that hospital records may become admissible as to an "act, condition or event" properly included therein upon establishing the authenticity and probable accuracy of such record.

I therefore commend the keeping of the most detailed records reasonably feasible.

This dissertation, while somewhat lengthy, does not pretend to be inclusive of all possible subjects nor exhaustive of those included. Rather, it has been prepared in the thought that it might assist the physician and surgeon in his contacts with the courts and thus be of mutual aid to both of our professions.



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